89-905

No. 89-___

Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MUSCOGEE COUNTY SCHOOL DISTRICT,
MUSCOGEE COUNTY BOARD OF EDUCATION,
AND DR. BRAXTON A. NAIL, SUPERINTENDENT
OF SCHOOLS FOR MUSCOGEE COUNTY,

Petitioners,

v.

PAIGE MITTEN, BY AND THROUGH HER FATHER
AND NEXT FRIEND, ALAN MITTEN,
AND ALAN MITTEN, INDIVIDUALLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALBERT W. STUBBS
JAMES E. HUMES, II
HATCHER, STUBBS, LAND, HOLLIS
& ROTHSCHILD
Attorneys for Petitioners,
Muscogee County School District
The Corporate Center, Ste. 500
Post Office Box 2707
Columbus, Georgia 31993-5699
(404) 324-0201

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, as a matter of statutory construction, prevailing parents under the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e) (1986) are entitled to statutory attorneys fees for time spent and expenses incurred by their counsel in administrative proceedings.

2. Whether the retroactive application of attorneys fees under the Handicapped Children's Protection Act of 1980, 20 U.S.C. § 1415(e) (1986) is an unconstitutional violation of either the spending powers clause or the separation of powers clause between the legislative and judicial branches of the Constitution of the United States.

3. Whether the parents of a handicapped child must attain the primary relief which they sought or merely obtain relief on any significant part of their petition in order to be a prevailing party so as to qualify for an award of attorneys fees under the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e) (1986).

4. Whether it is a proper exercise of discretion for a District Court judge to deny an award of attorneys fees to parents who are arguably otherwise entitled to such an award as prevailing parties under the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415 (1986) because either (1) the School District's provision of educational service was in accordance with a then recent Cooperative Agreement between involved state agencies or (2) the parents, with the ability to pay, were afforded free legal services, and are never to be billed.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings at the administrative level, before the District Court, and before the Court of Appeals were those identified in the caption.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutory and Constitutional Provisions Involved ... 2

Statement of the Case 4

Reason for the Issuance of a Writ Granting Certiorari 9

I. As to the Question of Statutory Construction 9

II. As To The Question Of What Parents Must Accomplish To Be "Prevailing Parties" Who, If Permitted, By HCPA, Would Be Entitled To An Award of Attorneys Fees 15

III. As To The Discretion The District Court Is Charged To Exercise In Awarding Attorney Fees Once It Determines That The Parent Or Student Is a Prevailing Party 17

IV. As To The Retroactive Assessment of Attorney Fees Being Violative Of The Spending Powers Clause And The Separation of Powers Clause Of The Constitution Of The United States 19

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

CASES CITED:

Counsel v. Dow, 849 F2d 731 (2nd Cir 1988), cert denied, ___ U.S. ___, 109 S.Ct. 391, 102 L.Ed.2d 380 (1988) 10

Dawsen Chemical v. Rohn & Haas Co., 448 U.S. 176, 100 S.Ct. 2601, 65 L.Ed.2d 696 (1988) 12

Duane M. v. Orleans Parish School Board, 861 F2d 115 (5th Cir 1988) 10

Eggers v. Bullitt County School Board, 854 F2d 892 (5th Cir 1988) 10

Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d. 40 (1983) 9, 16

Iranian Student Association v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979) 16

McCormack v. Burlingame Elementary School District, C-88-0799-JPV (N.D. Cal. 1989) 15

Moore et al. v. District of Columbia, et al. (No. 88-7003) 10, 12, 15

North Carolina Department of Transportation v. Crest Street Community Council, 476 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986) 8, 11, 12

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1553, 67 L.Ed.2d 694 (1981) 19

Rollison, et al. v. Biggs, et al. 660 F.Supp. 875 (D.Del. 1987) 12, 15

Serafini v. San Mateo City School District, et al., C-88-0799-JPV (N.D. Cal. 1989) 15

Simien v. City of San Antonio, 809 F.2d 255, 258 (5th Cir. 1987) 16

TABLE OF AUTHORITIES – Continued

Page(s)

Taylor, et al. v. City of Fort Lauderdale, 810 F.2d 1557 (11th Cir. 1987) 9, 16

United States v. Klein, 80 U.S. (13 Wall) 128 (1871) 20

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 20

Wilson, et al. v. Attaway, et al., 757 F.2d 1227 (11th Cir. 1985) 16

STATUTES

Education of All Handicapped Children's Act, 20 U.S.C. § 1401 *et seq*. 4, 6, 17, 19

Handicapped Children's Protection Act, 20 U.S.C. § 1415(e) 2, 6, 7, 8, 11

20 U.S.C. § 1415(b)(2) 8

20 U.S.C. § 1415(e)(4)(A) 10

20 U.S.C. § 1415(e)(4)(B) 6, 8, 10, 11

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 9

42 U.S.C. § 1988 ..... 8, 11, 16

No. 89-___

In The

Supreme Court of the United States

October Term, 1989

MUSCOGEE COUNTY SCHOOL DISTRICT, MUSCOGEE COUNTY BOARD OF EDUCATION, AND DR. BRAXTON A. NAIL, SUPERINTENDENT OF SCHOOLS FOR MUSCOGEE COUNTY,

Petitioners,

v.

PAIGE MITTEN, BY AND THROUGH HER FATHER AND NEXT FRIEND, ALAN MITTEN, AND ALAN MITTEN, INDIVIDUALLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The initial decision of Regional Hearing Officer Mary A. Bucknew is found at App., infra, 18-32. The decision, on appeal, of State of Georgia Hearing Officer Lauren O. Buckland is found at App., infra, 33-41. The Memorandum and Order of United States District Court Judge J. Robert Elliott, Middle District of Georgia, Columbus Division, is found at App., infra, 14-17. The decision of

the Eleventh Circuit Court of Appeals is found at App., infra, 1-13.

JURISDICTION

The decision of the Court of Appeals (App., infra, 1-13) was entered on July 20, 1989. Its decision on the Respondents' Motion for Rehearing was entered on September 11, 1989. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

20 U.S.C. § 1415(e) (1986) of the Handicapped Children Protection Act of 1986 ("HCPA" or the "Act") provides:

> "(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.
>
> (B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing part.
>
> (C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and

quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if –

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that –

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorney's fees otherwise authorized to be awarded unreasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection."

STATEMENT OF THE CASE

Respondent, Paige Mitten, age 13, is a multiple handicapped child who experiences cerebral palsy, blindness, is non-verbal, non-ambulatory, unable to crawl, sit or feed herself. She is non-academic and functions at a eight-month level. (App. 3) [Hereinafter Respondents, Paige Mitten and her Father, Alan Mitten, will be referred to as either "Paige", "the student", or "Colonel Mitten" respectively.]

Paige was entitled to special education from the Petitioner, Muscogee County School District (hereinafter "Muscogee County" or the "School District"), under the Education of All Handicapped Children's Act, 20 U.S.C. § 1401 et seq. When the Mitten family moved to Columbus in 1985, questions did arise as to how the School District would provide these services to Paige. As the Regional Hearing Officer found, Paige's parents, Colonel and Mrs. Mitten, wanted the School District to enroll their daughter in a special education class at one of the School District's local schools (App. 18-19). The School District evaluated the student, and due to the severity of her limitations and handicaps, it felt that she could be appropriately served and an education provided for her exceptionalities at the Department of Human Resources

(DHR) Service Center in Columbus. This is not a school building owned or operated by Muscogee County. Services were to be provided through a combination of teachers from the School District and the staff at the DHR facility. (App. 30) The Center provides services for handicapped individuals. After evaluating Paige and consulting with her parents, the School District placed Paige at the Service Center in September of 1985. As the Regional Hearing Officer noted, the parents did object and wanted Paige, again, to be placed at one of the School District's local schools. (App. 18-19, 28-29) At the time of Paige's placement, the initial Cooperative Agreement between the State of Georgia Department of Education and the Department of Human Resources had been signed just one month prior, in August of 1985. The Agreement permitted the placement and, as the Regional Hearing Officer noted, the placement was consistent with and not precluded by either Federal or State Law. (App. 28-29)

Regional Hearing Officer Buckner thus agreed with the School District's decision to place the student at the Center. So while the Mitten's primary objective (as found by the District Court – App. 15) was to have Paige removed from the DHR facility and placed in one of the School District's classrooms, the Regional Hearing Officer felt that the placement at the Center was appropriate.

The Regional Hearing Officer, however, did direct that the School District staff the student's I.E.P. with teachers and aids licensed solely by the Georgia Department of Education rather than through DHR-trained personnel, even though as the Cooperative Agreement permitted DHR staffing. (App. 30) Thus, with the DOE-DHR interagency agreement being just a month old at the

time, and in an area where special instruction was lacking, the School District was directed by the Regional Hearing Officer to use DOE personnel at all times during the school day. The agreement between DHR and DOE is still in place. This second issue was compromised as the Mittens wanted only DOE teachers, not DOE aides, to serve Paige and the School District wanted to use both DOE and DHR personnel. (App. 30-31, 36-37)

The School District disagreed with the Regional Hearing Officer, feeling that part of her decision which prohibited the use of DHR personnel was in error. It appealed that decision to the Georgia State Hearing Officer. No appeal was taken by the Mittens from the Hearing Officer's decision that their request to have Paige transferred to a public school classroom was denied. On appeal, the State Hearing Officer upheld the Regional Hearing Officer's decision. (App. 33-41) No appeal was taken from the State Hearing Officer's decision by either party.

With no issues pending the Mittens brought an action under the Education for All Handicapped Children's Act (EAHCA), 20 U.S.C. § 1401 et seq., and more specifically under the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(e). They sought an award of attorney fees and costs claiming that they prevailed in the special education administrative due process hearing. The HCPA was passed into law on August 5, 1986, at a time when there was nothing in the instant case pending for resolution. The School District respectfully submits the pertinent part of the 1986 Act as set forth in 20 U.S.C. § 1415(e)(4)(B), which is as follows:

> "In any action or proceeding brought under this subsection, the Court, in its discretion, may award reasonable attorney fees as part of the cost to the parent or guardian of the handicapped child or youth who is the prevailing party."

So, in summary, the child was found to be in the least restrictive environment for her, due to the severity of her exceptionalities. She could not benefit in any way from a public school setting, which the parents sought as their main objective. The parents wanted only DOE teachers to work with Paige. They did not get this either. DOE teachers and aides, but no DHR staff, were permitted to assist Paige. This was all resolved and over when the Mittens filed this law suit.

The District Court denied the Appellants's request for attorney fees and costs for three different reasons:

(1) The District Court's decision that 20 U.S.C. § 1415(e), as amended by the 1986 HCPA, did not authorize the imposition of attorney fees and costs for the time spent and expenses incurred before an administrative board is a law question.

(2) The trial court judge did not regard the Mittens as the prevailing party, finding that they did not achieve their primary objective, which was to have the student withdrawn from the DHR facility and placed in a public school classroom. (App. 15) The Mittens have contended that the matter of whether a party prevails is decided by whether they get "significant" as opposed to "primary" relief. Also, they contend that getting the child to a regular classroom was not their "primary" objective.

(3) In the exercise of his discretion, the trial court judge did not award fees because the placement of the child was appropriate and due to the fact that the DOE-DHR agreement had been in effect for just a month prior to the hearing. Additionally, Col. Mitten was financially able to afford his lawyer, but was apparently never asked to pay his attorney for her services. (App. 15-16) An abuse of discretion alone would warrant a reversal.

The Eleventh Circuit Court of Appeals reversed the District Court, expressly rejecting each of the reasons set forth by the trial judge which were the bases of his decision:

(1) The Court of Appeals, relying solely on a portion to the HCA's legislative history found that the Act authorized a recovery of attorney fees by prevailing parents for time spent and expenses incurred before administrative offices. It did so even though the Act authorizes the recovery of fees in 20 U.S.C. § 1415(e)(4)(B) for "any action or proceeding brought under this *subsection*". It did so in spite of the fact that it is only under subsection (b) – 20 U.S.C. § 1415(b)(2) – and not under 20 U.S.C. § 1415(e) that the complaint here could be brought. The decision did not attempt to distinguish this Court's decision in *North Carolina Department of Transportation v. Crest Street Community Council*, 476 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986) which held that under 42 U.S.C. § 1988 a prevailing party could not recover fees for time spent in administrative hearings.

(2) The Court of Appeals found that the Mittens were the "prevailing party" and thus entitled to an award of fees. It reasoned that the Mittens were the prevailing

party under a "significant relief standard" because they obtained a "free and appropriate education". This was the holding in spite of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) which determined the prevailing party by the primary relief sought and *Taylor et al. v. City of Fort Lauderdale*, 810 F.2d 1557 (11th Cir. 1987) which reaffirmed this central relief theme.

(3) The Court of Appeals, while apparently recognizing that the trial court may, but does not have to, award fees to a prevailing party, found that the trial court judge abused his discretion in denying them here, this in spite of the fact that the denial of fees here was based on the fact that the School District placed the child and provided services exactly according to the one month old Cooperative Agreement between the involved State of Georgia agencies, and further due to the fact that Colonel Mitten, able to pay fees, got his attorneys free of charge.

Further, the Court of Appeals found no constitutional violation by the retroactive imposition of fees, holding that as long as the statute unambiguously awarded fees, as here, there was no violation of the spending powers clause, Article I, Section 8, of the Constitution of the United States.

The jurisdiction of the federal courts below was based on 28 U.S.C. § 1291.

REASONS FOR THE ISSUANCE OF A WRIT GRANTING CERTIORARI

I. As To The Question of Statutory Construction

At present there exists a clear division of authority between United States Courts of Appeals on the question

of whether a prevailing parent is entitled to an award of attorneys fees for time spent in administrative hearings. The Eleventh Circuit below has joined the following Circuits in holding that the Act authorizes the award of fees.

> (1) *Duane M. v. Orleans Parish School Board*, 861 F2d 115 (5th Cir. 1988);
>
> (2) *Eggers v. Bullitt County School Board*, 854 F2d 892 (5th Cir. 1988);
>
> (3) *Counsel v. Dow*, 849 F2d 731 (2nd Cir 1988), cert denied, ___ U.S. ___, 109 S.Ct. 391, 102 L.Ed.2d 380 (1988) [in dictum]

The District of Columbia Court of Appeals in *Moore v. District of Columbia et al.*, Case No 88-7003, (decided June 20, 1989), has held that fees are not permitted. With the clear division of authority on one of the statutes' critical feature and with the area of special education being an active, developing field in education, direction from the Supreme Court is both necessary and desirable.

In Muscogee County's view, the correct construction is that of the District of Columbia Circuit Court of Appeals in *Moore* (supra) and the District Court below. The Court of Appeals decision below on awarding fees relies exclusively in administrative history. However, as *Moore et al. v. District of Columbia, et al.* (supra), holds, the clear language of the statute should govern and control. The 1986 Amendment changed § 1415(e)(4) to § 1415(e)(4)(A) and added subparagraphs (A) through (G). The new subparagraph (B) authorizes an award of attorney fees and states as follows:

> "In any action or proceeding brought under this subsection, the Court in its discretion may award attorney fees as part of the cost of the

> parents of the handicapped child . . . (as) the prevailing party".

Thus, a court's authority to award fees under new subparagraph (B) is statutorily restricted to actions or proceedings brought "under this subsection" which is subsection (e). Section 1415 has five subsections (a) through (e). The question then is what actions or proceedings can be brought under subsection (e). The administrative due process hearing which would permit a recovery of fees is not an action brought under subsection (e). It can only be brought under paragraph 2 of subsection (b). The only mention of the due process hearing under subsection (e) is that the decision resulting from such a due process administrative hearing under subsection (b) can be appealed to the State Educational Agency under subsection (c) or to the court under certain circumstances as authorized by paragraph 2 of subsection (e).

The only action or proceeding that can be brought under subsection (e) is found at paragraph 2 of that subsection. That is a civil action or proceeding in a state or federal court without regard to the amount of controversy. Since no other action or proceeding can be brought under subsection (e), then the Court's authority to award attorney fees is restricted to the civil actions or proceedings in either state or federal courts.

Further, the Court of Appeals' award of attorney fees is in direct contradiction of the controlling Supreme Court decision of *North Carolina Department of Transportation v. Crest Street Community Council, Inc.*, (supra). The Supreme Court there held that under 42 U.S.C. § 1988, a plaintiff could not recover for attorney fees in civil rights cases for prevailing in administrative proceedings. *Crest*

Street was decided after the enactment of the 1986 Amendment to the Act. *Crest Street* is ignored by the Court of Appeals in its July 20, 1989 decision. While the Court of Appeals at page 3438 states that the School District's reliance upon *Rollison v. Biggs*, 660 F.Supp. 875 (D.Del. 1987) was misplaced, this decision is a correct application of *Crest Street*. The School District's reliance is not misplaced. The Court of Appeals' decision departs from *Crest Street* and from the District Court's decision which correctly interprets *Crest Street*. The School District would also note that *Moore et al. v. District of Columbia et al.*, (supra) agreed with the School District's position. *Moore* also held that under *Crest Street* prevailing parents could not recover for attorney fees for cases resolved at the administrative level.

Moore et al. v. District of Columbia et al. (supra) gives three reasons, according to the rationale as set forth in *Dawsen Chemical v. Rohn & Haas Co.*, 448 U.S. 176, 100 S.Ct. 2601, 65 L.Ed.2d 696 (1988) that the clear language of the statute governs any case of statutory interpretation, why a recovery of fees is not authorized here:

> "1. The reference to "brought under this subsection" is to subsection (e), which is one of six subsections of section 1415. When Congress wished to refer more broadly to other provisions of the statute, it said so explicitly. See, e.g., s 1412 ("to qualify for assistance under this subchapter"), s 1413(a) ("the eligibility requirements set forth in section 1412 of this title"), s 1413 (a)(9) ("Federal funds made available under this subchapter"), s 1415(e)(2) ("complaint presented pursuant to this section"), and s 1415(e)(3) ("during the pendency of any proceedings conducted pursuant to this section")

findings and decision made under subsection (b) of this section . . . and any part aggrieved by the findings and decision under subsection (c) of this section (subsection dealing with administrative proceedings by State educational agencies), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

Section 1415(e)(2) permits a "party aggrieved" by the administrative decision to bring a civil action "with respect to the complaint presented pursuant to this section (section 1415)," i.e., such party may bring suit in a State or federal court to challenge the adverse administrative decision of the State agency. None of the appellees was a "party aggrieved" by the administrative decision in these cases, since all the appellees prevailed in those proceedings. Cf. *Robinson v. Pinderhughes*, 810 F.2d 1270, 1275 (4th Cir. 1987). Since there is nothing in the provisions governing the State administrative procedures (subsections 1415(b) and (c)) that provides for the award of attorney fees in the administrative proceeding or even suggests the possibility of such an award, the appellees cannot claim that they are "parties aggrieved" by the administrative decision because that decision did not award them attorney fees.

Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988), involved the "stay-put" provision of the EHA, which provides that during the pendency of any proceeding conducted pursuant to section 1415, the child shall remain in its current educational placement. 20 USC s 1415(e)(3). In suits brought by parents challenging changes in the educational placement of handicapped children that were made during State administrative proceedings, the Supreme Court held that during such proceedings a State could not remove a child from its existing school placement on the ground that the child had engaged in dangerous or disruptive conduct in the school. In rejecting the State's claim that there should be a "dangerousness" exception to the "stay-put" provision, the Court stated that school officials had adequate authority to deal with a "truly dangerous child" by "invoking the aid of the courts under s 1415(e)(2), which empowers courts to grant any appropriate relief", 108 S.Ct. at 605, and that "school officials are entitled to seek injunctive relief under s 1415(e)(2) in appropriate cases." *Id.* at 606.

We do not read the statements in *Honig*, which involved a quite different issue, as indicating that a suit seeking attorney fees for services rendered in the administrative proceedings would be an action or proceeding "brought under" subsection 1415(e). The Supreme Court there addressed the authority of a district court to grant an injunction pursuant to its power under s 1415(e)(2) to "grant such relief as the court determines is appropriate." In concluding that the authorized "relief" a court may grant includes an injunction, the Supreme court intimated no opinion on whether a suit for attorney fees is "brought under" subsection 1415(e).

2. Attorney fees may be awarded only to a 'prevailing party.' This language refers to a prevailing party in the 'action or proceeding brought under this subsection,' i.e., attorney fees may be awarded only to someone who has prevailed in an 'action or proceeding' brought under subsection 1415(e). The fact that the appellees were the prevailing parties in the administrative proceedings did not make them 'prevailing part(ies)' to whom s 1415 (e)(4)(B) authorizes the award of attorney fees.

3. The attorney fees are to be awarded as 'part of the costs'. If an attorney fee were awarded in a suit brought solely to obtain the fee, the fee could not be awarded as 'part of the codes' into the suit since the fee was the sole objective of the suit".

There are cases at the district court level, which hold in agreement with *Moore* (supra) that fees are not recoverable under the HCPA. *Rollison et al. v. Biggs et al.*, 660 F.Supp. 875 (D. Del. 1987); *Serafina v. San Mateo City School District et al.*, C-88-0799-JPV (N.D. Cal. 1989); *McCormack v. Burlingame Elementary School District*, C-88-0141-JPV (N.D. Cal. 1988).

II. As To The Question Of What Parents Must Accomplish To Be "Prevailing Parties" Who, If Permitted, By HCPA, Would Be Entitled To An Award of Attorneys Fees.

Certainly, the basic determination that any court must make in awarding or denying fees under the Act to a parent is what is the standard and was it satisfied. There are clear guidelines established both by the United States Supreme Court and the Eleventh Circuit itself which the Court of Appeals ignored.

The Court of Appeals' decision in error finds that the Mittens were the prevailing parties. The Court, (App. 2), apparently determined that the Mittens were the prevailing parties because they secured a free and appropriate education for their child. This rather all-encompassing statement is a departure from controlling case authority. In *Hensley v. Eckerhart,* (supra), the Supreme Court held that the prevailing party is determined by whether or not primary relief sought is obtained. In *Taylor, et al. v. City of Ft. Lauderdale,* (supra at 1557) this Court of Appeals reaffirmed that the Eleventh Circuit "follows the central issue test for determining and awarding attorney fees". The instant decision also ignores the fact that the School District did not refuse to develop an IEP. The School District tried to evaluate and staff the child through the appropriate process. There really can be no question about the fact that the Mittens' primary objective was to get the child moved from the DHR facility in Columbus to a regular school building. This they did not do. "(The) test for the prevailing party's status is whether the Plaintiff prevailed on the central issue by acquiring the primary relief sought." *Simien v. City of San Antonio,* 809 F.2d 255, 258 (5th Cir. 1987); *Iranian Student Association v. Edwards,* 604 F.2d. 352, 353 (5th Cir. 1979). In *Wilson, et al. v. Attaway, et al.,* 757 F.2d. 1227, (11th Cir. 1985), which was decided after *Hensley,* the Eleventh Circuit continued to maintain the "primary" or "central" standard when it awarded attorney fees pursuant to 42 U.S.C. § 1988 to a prevailing party "who has been successful on the central issue." Then in *Taylor, et al. v. City of Ft. Lauderdale, (supra),* the Eleventh Circuit reaffirmed that standard at page 1155:

> "This Circuit follows the central issue test for determining and awarding attorney fees. In order to qualify it as a prevailing party, the Plaintiff must be successful on the central issue in the case exhibited by the fact that the Plaintiff acquired the primary relief sought. The decision on whether to award attorney fees is made by the District Court and reviewable only for abuse of discretion."

The effect of the Court of Appeals decision is that the attainment of "a free and appropriate education" (App. 3) qualifies a parent as a prevailing party. By holding this "was the significant relief sought" the Court of Appeals qualified the Mittens as "prevailing" in the case. A free and appropriate education is what the Education of All Handicapped Children's Act, 20 U.S.C. § 1401 et seq is all about. If a parent gets only a part of the relief sought, it means that what the educational authority tried to provide was in some way not "free and appropriate education". Unless reversed, the Eleventh Circuit has sanctioned the award of fees if a parent gets any type of adjustment in the student's educational program, however removed from the "central" or "significant" relief which the parents sought that the attained adjustment might be.

III. As To The Discretion The District Court Is Charged To Exercise In Awarding Attorneys Fees Once It Determines That The Parent Or Student Is A Prevailing Party.

The School District is aware that the District Court Judge's exercise of discretion to not award attorney fees is subject to appellate review. The School District is aware

of the fact, as the Court of Appeals mentions in its decision (App. 7) that fees can be awarded to non-profit legal services which by law may not bill for their efforts. However, the Court of Appeals was able to point to no authority to justify its reversal of the District Court's decision not to award fees, where, as here

(1) The placement of the child was recognized to be appropriate and in accordance with a recently enacted pact between state governmental agencies which itself is permitted by 20 U.S.C. § 1401 et seq and

(2) The parent had the *ability to pay* for his legal services, but had never been billed.

If there is an instance where, in the exercise of discretion, justifiable reasons are present upon which to deny a demand of fees, this case is it. In the Cooperative Agreement enacted by the two State of Georgia departmental agencies, the provisions were set out which authorized the Department of Human Resources, as opposed to the Department of Education, to serve the student's needs with DHR trained personnel. (App. 30-31, 36-37) That is the only part of the student's I.E.P. which the Regional Hearing Officer changed. As the Regional Hearing Officer found, the placement itself at the DHR Center was consistent with Federal and State law. (App. 28-29). And certainly in none of the decisions in which fees have been awarded to non-profit services agencies has the client held the ability to pay, but was never asked to.

The Court of Appeals, apparently to justify its reversal on the question of the District Court's discretion makes certain incorrect statements. (App. 3)

(1) The School District, did not as the Court of Appeals alleges, refuse to develop on I.E.P. or to implement the Mitten's old one. The Mittens, as the Regional Hearing Officer held, wanted Muscogee County to implement and out-of-date I.E.P. from Texas. The School District requested the up-to-date I.E.P., got it, and implemented it on a temporary basis. The parents would not initially give Muscogee County permission to test the student so a permanent I.E.P. could be set up. When they did, one was drawn up (App. 20).

(2) The I.E.P. hearing requested by the parents was delayed, not because of the School District's wishes, but solely by the fact that the School District wanted to confirm the attorney who asked for the hearing was authorized to do so by the parents and then by the parent's request for a continuance (App. 20)

IV. As To The Retroactive Assessment of Attorney Fees Being Violative Of The Spending Powers Clause And the Separation of Powers Clause of the Constitution of the United States

The Handicapped Children's Protection Act applied to any action brought under EAHCA, 20 U.S.C. § 1401 et seq., which was pending on July 4, 1984 and as well to all actions filed after that date. In the instant case there was a final decision dated March 6, 1986 unappealed from.

There exists a quasi contract between federal and state governments receiving funds to educate exceptional children. To retroactively impose the attorney fees obligation on Petitioner would violate the contract formed under the founding statute. *Pennhurst State School and*

Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1553, 67 L.Ed.2d 694 (1981). Georgia has submitted a plan for these children which the federal government approved, and then funds followed.

A retroactive application of the obligation of attorney fees prescribes the rule or decision on an already completed case. Clearly that is impermissible and an intrusion into separation of powers between the legislative and judicial branches. *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ALBERT W. STUBBS
JAMES E. HUMES, II
HATCHER, STUBBS, LAND, HOLLIS & ROTHSCHILD
P. O. Box 2707
Columbus, Georgia 31993-5699
(404) 324-0201
Attorneys for Petitioners, Muscogee County School District, Muscogee County Board of Education and Dr. Braxton A. Nail, Superintendent of Schools for Muscogee County.

December 4, 1989

No. 89-___

In The

Supreme Court of the United States

October Term, 1989

MUSCOGEE COUNTY SCHOOL DISTRICT,
MUSCOGEE COUNTY BOARD OF EDUCATION,
AND DR. BRAXTON A. NAIL, SUPERINTENDENT
OF SCHOOLS FOR MUSCOGEE COUNTY,

Petitioners,

v.

PAIGE MITTEN, BY AND THROUGH HER FATHER
AND NEXT FRIEND, ALAN MITTEN,
AND ALAN MITTEN, INDIVIDUALLY,

Respondents.

**Petition For A Writ Of Certiorari To Review
The Judgment Of The United States Court
Of Appeals For The Eleventh Circuit**

APPENDIX OF PETITIONERS, MUSCOGEE COUNTY SCHOOL DISTRICT, ET AL.

Paige MITTEN, By and Through her father and next friend Alan MITTEN, and Alan Mitten, Individually, Plaintiffs-Appellants,

v.

MUSCOGEE COUNTY SCHOOL DISTRICT, Muscogee County Board of Ed., Dr. Braxton Nail, individually in his capacity as Superintendent, Defendants-Appellees.

No. 88-8238.

United States Court of Appeals
Eleventh Circuit

July 20, 1989

Parents of handicapped child brought suit seeking an award of attorney fees, after they prevailed in administrative proceeding brought under the Education of the Handicapped Act. The United States District Court for the Middle District of Georgia, No. 87-76-COL, J. Robert Elliott, J., denied the petition, and parents appealed. The Court of Appeals, Hoeveler, District Judge, sitting by designation, held that: (1) parties who prevail at the administrative level are entitled to attorney fees for all proceedings brought under the Education of the Handicapped Act; (2) parents were "prevailing parties" for purposes of award of attorney fees because they achieved the significant relief sought, which was to assure that their daughter would receive a free and appropriate education; and (3) whether parents had paid attorney fees or could afford to do so were irrelevent factors in determining their entitlement to attorney fees under the Act.

Reversed and remanded.

Appeal from the United States District Court for the Middle District of Georgia.

Before HATCHETT and CLARK, Circuit Judges, and HOEVELER *, District Judge.

HOEVELER, District Judge.

In this action, the Court is faced with a question of statutory construction. Specifically, the issues before the Court are whether the appellants were prevailing parties under the Handicapped Children's Protection Act of 1986 ("HCPA" or the "Act"), 20 U.S.C. 1415 (e) (1986), and whether they are thereby entitled to statutory attorney's fees. This action was brought by the parents of a mentally retarded child against the Muscogee County School District ("MCSD" or the "school district") on the basis of the result in administrative hearings in which the parents had demanded "free and appropriate"[1] education for their child. Because the appellants were successful in obtaining a free and appropriate education for their child,

---

*Honorable William M. Hoeveler, U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] The Education of the Handicapped Act, 20 U.S.C. sections 1400-1485 (1982 & Supp. IV 1986), provides, in pertinent part, that:

> [i]n order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) The State has in effect a policy that assures all handicapped children the right to a free and appropriate education.

20 U.S.C. section 1412 (1982 & Supp. IV 1986).

we hold that they were prevailing parties under the Act. The HCPA, its legislative history and the weight of authority clearly indicate that parties who prevailed at the administrative level are entitled to attorney's fees for all proceedings brought under the Education of the Handicapped Act ("EHA"), 20 U.S.C. section 1415 (e) after July 3, 1984. We reverse.

Background

Paige Mitten is a severely handicapped twelve year old child suffering from cerebral palsy, partial blindness and mental retardation. She cannot sit alone, walk, crawl or feed herself, nor is she toilet trained. Paige and her family moved from Texas to Muscogee County in 1985. Paige had been attending public schools in Texas, where the school system had developed an individualized education plan ("IEP") for her. She had last been evaluated in February, 1984.

The Muscogee County School District refused to permit Paige to enter the public school system. The District also failed to develop a new IEP for her or to implement the old one. Instead, the District recommended residential placement at the Department of Human Resources Columbus Service Center (the "Center"). After the initial recommendation, the parents met with the school district twice, attempting to get Paige placed at a local school. When they could get no further action from the school district, Paige's parents enrolled her in the Center on a temporary basis. In October 1985, an individualized program plan ("IPP") was developed for Paige at the Center,

but no educational plan ("IEP") was developed or implemented. Neither licensed teachers nor aids were provided for her.

None of the personnel at the Center held valid teaching certificates. Not until October 23, 1985 did the school district decide, with the parents' consent, to implement an updated IEP from the Texas school system on a twenty day temporary basis as of October, 1985. At that time, the school district decided to develop a permanent IEP by November 12, 1985.

Paige's parents requested a due process hearing on October 12, 1985. The requested hearing was not scheduled until November 24, 1985 and was not held until December 4, 1985. At the hearing, the regional hearing officer determined that the school district had failed to provide a timely hearing and had failed to provide free and appropriate education as required under the EHA. However, the hearing officer found against the parents on their contention that a school site was more appropriate for Paige than the residential training center. She determined that as long as educational standards were met and licensed teachers were provided during the school day, Paige could be taught at the Center.

The School District appealed. The state hearing officer sustained the decision of the regional hearing officer. After the passage of the HCPA in 1986, and based upon its retroactive enforcement date, the parents sought an administrative award of attorneys' fees and costs. The state hearing officer concluded that the parents could not petition administratively for such an award, but must seek relief from the federal court.

Paige's parents brought suit in the federal district court on June 5, 1987. The district judge hearing the matter denied their petition and granted summary judgment to the school district. The parents subsequently filed a motion to alter and amend the judgment, which motion was denied. For the reasons that follow, we reverse the decision of the District Court.

Discussion

Congress enacted the Handicapped Children's Protection Act, 20 U.S.C. section 1415 (e) (4) (B) as an amendment to the Education of the Handicapped Act ("EHA"), 20 U.S.C. section 1415 (e) (4), in August, 1986. On its face, the statute provides attorneys fees to the prevailing party in administrative actions. It provides that

> In any action or proceeding brought under this subsection, the court, in its discretion may award reasonable attorneys fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

20 U.S.C. section 1415 (e) (4) (B). The statute was expressly made retroactive to any action or proceeding pending on or brought after July 4, 1984. Section 5 of the HCPA provides:

> The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615 (e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

Pub.L. No. 99-372, 100 Stat. 796 (Aug. 5, 1986). The district court's holding that 20 U.S.C. section 1415 (e), as amended by the 1986 Act, does not authorize the imposition of attorney's fees and costs for time spent and expenses incurred before administrative boards is in error.

The term "action or proceeding" under the Act includes administrative hearings and appeals. *Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418, 420 (D.Kan. 1987). *See also Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp. 921, 923 (C.D.Cal. 1987) (Congress intended to provide attorneys' fees for work done solely at the administrative level). The district court's reliance upon *Rollison v. Biggs*, 660 F.Supp. 875 (D.Del. 1987) is misplaced. The weight of authority is contrary to the *Biggs* decision. *See, e.g., Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir. 1988) (the HCPA permits recovery of attorney's fees to the prevailing party at both the judicial and administrative levels); *Neisz v. Portland Pub. School Dist.*, 684 F.Supp. 1530 (D.Or. 1988) (costs and attorney's fees incurred by handicapped student's parents in a successful administrative challenge to the school district's determination were recoverable under the HCPA); *Burpee v. Manchester School Dist.*, 661 F.Supp. 731 (D.N.H. 1987) (permitting recovery of attorney's fees at the administrative level); *Kristi W. v. Graham Ind. School Dist.*, 663 F.Supp. 86 (M.D.Tex. 1987).

Appellees contend that administrative hearings are brought under subsection (b) of the statute rather than subsection (e) and, therefore, "any action or proceeding brought under this subsection" does not refer to administrative proceedings. However, the legislative history of

the 1986 amendments to the EHA explicitly addresses this problem and states that

> Section 2 of the bill amends section 615 (e) (4) of EHA to permit a court, in its discretion, to award reasonable attorneys' fees, costs and expenses to the parents or guardian of a handicapped child or youth who is the prevailing party in an action or proceeding (a due process hearing or a state level review) brought under Part B of EHA.

H.R.Rep. No. 99-296, 99th Cong., 2nd Sess. (1985) at 5. *See also* sec. 4 of Pub.L. No. 99-372, 100 Stat. 796, 797-98 (1986) (requiring the General Accounting Office to collect data on the fees awarded in administrative and court proceedings).

Thus, if the appellants can establish that they were the prevailing parties in their administrative challenge to the school district's determination, they may recover their attorney's fees and costs in pursuing that challenge. This issue involves construction of the term "prevailing parties" under the Act. The appellants contend that the trial court erred in misconceiving their primary objectives and denying them attorneys fees and costs under the EHA. The district court found that the parents were not the prevailing parties in the administrative hearings because they failed to achieve their primary objective, which according to the court, was to have Paige placed in the local school system. The appellants contend that they were the prevailing parties because they achieved the most significant relief they sought, which was to ensure that Paige received a free and appropriate education. The school district contends that the district court applied the correct standard and argues that because appellants did

not achieve the central issue of their effort they could not properly be awarded attorney's fees. The school district cites as controlling *Simien v. City of San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987) (the test for prevailing party status is whether the plaintiff prevailed on the central issue by acquiring the primary relief sought).

However, the statute's legislative history addresses this problem by explicitly requiring that the term "prevailing party" be given the same meaning it was given by the United States Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), which employed the significant relief standard. H.R.Rep. No. 99-296, 99th Cong., 2nd Sess. (1985) at 5-6 (addendum 3). *See also* S.Rep. No. 99-112 at 13, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S. Code Cong. & Admin.News 1798, 1803.

The appellants have the better argument on this issue for two reasons. First, the regional hearing officer found for Paige's parents in the administrative hearing. It was the school district that appealed the hearing officer's determination. The original determination was upheld by the state hearing officer. Therefore, it appears that procedurally appellants were the prevailing party.

Second, the district court mistakenly applied the wrong standard in determining that substantively the parents were not the prevailing party because they did not achieve what the court determined was their primary objective. The legislative history indicates that the correct standard is the significant relief standard. Even if we assume that the parents' primary objective was to have Paige enrolled in the local public school, it seems clear

that they wanted their child to have appropriate education. While the situs may be important, certainly the fundamental objective is the training and education of the child. In this quest the parents prevailed. The regional hearing officer determined that the child should have that which constituted a "free and appropriate education." This was the significant relief sought, and the lower court was in error in determining otherwise.

The district court also based its denial of attorneys fees on what it termed the "independent grounds" that (1) the regional hearing officer found Paige's placement at the Center to be appropriate, and (2) Paige's parents had paid no attorneys fees though they could have afforded to do so. The district court apparently felt that these were special circumstances giving it discretion to refuse to award the fees. Although the awarding of fees is termed "discretionary" under the EHA, the discretion is narrow and the reasons given in support of the discretion are subject to appellate review. *Concerned Democrats of Florida v. Reno*, 601 F.2d 891 (5th Cir. 1979) (awarding of attorneys' fees in civil rights and Title VII actions, though labeled discretionary, is subject to appellate review of the specific reasons supporting the discretion). Appellants contend that in this case the court abused its discretion because it considered factors which should have been foreclosed to it as a matter of law and which renders the Court's decision clearly erroneous.

The question of significant objective achievement has previously been discussed. However, it is appropriate to develop the lower court's clear error in this regard. The district court found that because the hearing officer left Paige at the Center rather than placing her in a day

school as her parents requested, Paige's placement at the Center was tantamount to providing her with the "free and appropriate education" mandated by the EHA. This conclusion, however, overlooks the fact that although Paige was permitted to stay at the Center, her educational program there was completely revamped. Originally, Paige was not provided with an educational plan at the Center. Neither were licensed teachers provided for her. The hearing officer directed the Center to provide her with eight hours of instruction by licensed teachers during the school day. Thus, the hearing officer can hardly be said to have found the school district's provisions for Paige appropriate.

Appellees argue further that the state was introducing "a new methodology." (Appellee's Brief at 28). Thus, because of the new approach and because the state had hitherto not provided educational services for severely retarded children, the court, appellees argue, was properly exercising its discretion in denying attorney's fees. This position is mistaken, however, because it assumes that the existence of a good faith, through erroneous defense by the School Board to the administrative challenge brought by Paige's parents would obviate the necessity of imposing attorney's fees on the appellees. Attorney's fees are awarded regardless of the good faith of a defense. *Espino v. Besteiro*, 708 F.2d 1002, 1005-06 (5th Cir. 1983). Fees should, for the most part, be awarded to prevailing plaintiffs as a matter of course. *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985).

The fact that attorneys fees had not been paid although Paige's parents could afford to do so is also irrelevant. There is no requirement under the statute that

fees be paid before seeking reimbursement. The payment of the fees is a contractual obligation owed by the appellants to their attorney. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (attorneys' fees are awardable even to nonprofit legal services attorneys who by statute may not receive or incur client fees); *Duncan v. Poythress*, 750 F.2d 1540, 1545 (11th Cir. 1985) (*pro se* attorney may recover fees). Neither is the appellants' ability to pay a relevant subject for the court's consideration in awarding fees. The statutorily guaranteed right to attorneys' fees does not depend on a party's economic resources or the availability of free legal assistance. *Gore v. Turner*, 563 F.2d 159, 163-64 (5th Cir. 1977).

Not only do civil rights and Title VII attorney's fees cases substantiate appellants' claim that the judge's discretion in awarding attorneys' fees is narrow, but the equities in this case lie with the appellants. It was the school district that dragged its feet in scheduling a hearing in the first place, and it was the school district who appealed the regional hearing officer's decision, a decision which was affirmed at the state level. The school district should not now be permitted to claim that the appellants did not actually achieve their goal nor defend by contending that no fee money has actually changed hands – a fact which is disputed by the appellants, and unsupported by evidence.

An issue the district court found unnecessary to rule on, but raised by the Appellee in its brief, is the argument that the retroactive imposition of attorneys' fees as authorized by the 1986 amendments to the EHA is an unconstitutional violation of the spending powers under Article 1, section 8 of the Constitution of the United States.

Appellees cite *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) for this proposition.

Appellants points out that in *Pennhurst*, however, the Supreme Court addressed the issue of whether Congress, acting only pursuant to the spending clause could impose financial burdens on the states in exchange for federal funding. The Court held that the statute involved in that case created no substantive rights and that therefore Congress could not do so unless it did so unambiguously. *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1539-40. However, the HCPA, the statute at issue in this case, unambiguously provides for attorneys' fees. Furthermore it was not enacted pursuant solely to the spending power but pursuant to section 5 of the fourteenth amendment of the United States Constitution. *See*, 20 U.S.C. sec. 1401 (b)(8), (9) (equal opportunity obligations); *see also Manecke v. School Bd.*, 762 F.2d 912, 918 n. 6 (11th Cir. 1985) (the EHA vindicates handicapped children's constitutional claims to a free appropriate education).

Although this court has held that the retroactive application of the HCPA is unconstitutional where a final unappealed judgment was rendered prior to the Act's effective date, *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 808 (11th Cir. 1988), we point out that the factual situation in the instant case is entirely different. In *GARC*, the case was originally filed in 1978. The HCPCA, by its terms, provides attorney's fees for all cases brought *after* July 3, 1984 or pending as of July 4, 1984. Pub.L. No. 99-372, 100 Stat. 796 (Aug. 5, 1986). Thus, the HCPA would permit an award of attorney's

fees in *GARC* only if the case could be considered pending as of July 4, 1984. The issue before the court was the construction of the statutory term "pending" under the HCPA. *GARC*, 855 F.2d at 809. The *GARC* court resolved the issue by holding that the class of cases "pending" on July 4, 1984 does not include a case in which a final unappealed judgment as to attorney's fees was rendered and became unappealable before August 5, 1986. *Id.* Here, the appellants brought their administrative challenge in the fall of 1985. Because the HCPCA expressly provides that attorney's fees are available for cases brought after July 3, 1984, *GARC* is inapplicable.

Conclusion

The judgment of the district court is REVERSED and this case is REMANDED to the district court for a determination of the amount of reasonable attorneys' fees to be awarded to the appellants.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

PAIGE MITTEN, by and through her father and next friend, Alan Mitten, and ALAN MITTEN, personally,	CIVIL ACTION NO. 87-76-COL
Plaintiff	(Filed March 11, 1988)
vs.	
MUSCOGEE COUNTY SCHOOL DISTRICT, MUSCOGEE COUNTY BOARD OF EDUCATION, and DR. BRAXTON A. NAIL, as Superintendent of Schools for Muscogee County,	
Defendants	

MEMORANDUM AND ORDER

The Plaintiffs' action is brought under that particular portion of the Education for All Handicapped Children's Act, 20 USC §1401 et seq., designated as the Handicapped Children's Protection Act of 1986, 20 USC §1415 (e). The Plaintiffs seek an award of attorney fees and costs incurred at the administrative due process level and for bringing their action before this Court.

The Plaintiffs have filed a motion/petition for award of attorney's fees or in the alternative, motion for

summary judgment, and the Defendants have filed their motion for summary judgment.[1]

In pertinent part, the 1986 Act, at 20 USC §1415 (e) (4) (b) reads as follows:

> "In any action of proceeding brought under this subsection, the Court, in its discretion, may award reasonable attorneys' fees as part of the cost to the parents or guardian of the handicapped child or youth who is the prevailing party."

The Court denies the Plaintiffs' motion/petition for award of attorneys' fees and sustains Defendants' motion for summary judgment, the effect of which is to deny an award of attorneys' fees and costs. The reasons for this determination are:

> (1) Under the facts of this case, the Plaintiffs do not appear to have been prevailing parties. They were not successful in what the Court regards as their primary objective, which was to have their daughter removed from her placement at the Department of Human Resources facility.
>
> (2) In the exercise of the discretion entrusted to it by 20 USC §1415 (e) the Court declines to award attorneys' fees and costs for the following independent reasons:
>
> > (a) The Regional Hearing Officer found that the student's placement was an

---

[1] The Court notes that Defendants did not oppose Plaintiffs' apparent late filing or responses to Defendants' request for admissions, and accepts said responses as being timely filed.

appropriate removal from the regular education school environment. The School District's placement of the child at the DHR Facility was in accordance with the then recently enacted DOE-DHR Cooperative Agreement in the State of Georgia.

(b) Colonel and Mrs. Mitten have apparently paid no attorneys' fees and costs. The Court is aware of the *Blum vs. Stenson,* 465 US 886 (1984) decision and other authority which deal with reimbursement of costs and fees to legal services groups and attorneys funded by federal or private funds. However, the Court, in the exercise of its discretion, declines to award fees and costs to the Plaintiffs in this case, where they could have afforded to pay them but either were not billed for or did not pay any fees or costs.

(3) 20 USC §1415 (e), as amended by the 1986 Act, does not authorize the imposition of attorneys' fees and costs for time spent and expenses incurred before administrative boards. The Court agrees with the rationale of the Court's decision in *Rollinson, et al. vs. Biggs, et al.,* (1986-87 EHLR, Dec. 558:359, D. Dela. 80-165 [1987]) and specifically its reliance on the Supreme Court case of *North Carolina Department of Transportation vs. Crest,* 107 S. Ct. 336 (1986). It further appears to the Court that the Plaintiffs' due process hearing was not one brought under 20 USC §1415 (e) but rather under 20 USC §1415 (b). It is only where a proceeding is brought under 20 USC §1415 (e) that fees and costs can be assessed.

The Court finds it unnecessary to rule upon the constitutionality of the 1986 Act as it may pertain to either the spending powers or the separation of powers clauses of the Constitution.

SO ORDERED.

This 11th day of March, 1988.

/s/ Robert Elliott
UNITED STATES DISTRICT
JUDGE

This is to certify that I have this date served the within and foregoing order upon the following:

Jonathan A. Zimring

James Humes

This 11th day of March, 1988.

/s/ Carolyn H. Fryer
Deputy Clerk

STATE BOARD OF EDUCATION

STATE OF GEORGIA

IN RE: CASSANDRA PAIGE MITTEN, a minor, MR. & MRS. ALAN MITTEN,	* BEFORE THE * REGIONAL
Petitioner,	* HEARING OFFICER
VS.	*
MUSCOGEE COUNTY SCHOOL SYSTEM,	*
Respondent.	*

I. INTRODUCTION

Cassandra Paige Mitten (hereinafter referred to as "the child") age 9, born November 8, 1976 is a transfer special education student from the North East Independent School District, San Antonio, Texas, identified as a multiple handicapped, having cerebral palsy, visually handicaped (even though she responds to light), non verbal, and non ambulatory. The child cannot sit along, feed herself, walk or crawl, (she can roll herself around) and is not toilet trained. The functional level of the child is below 8 months and she is non academic.

The parents, Alan and Kathy Mitten, moved to Columbus on June 1, 1985 and attempted to enroll their child into special education in the Muscogee County School District on June 20, 1985 providing the central registration office with an Individualized Education Plan (IEP) dated March 15, 1984 from the North East Independent School District along with evaluations and assessments

dated February 8, 1984 for which the aforementioned IEP was developed.

In mid-August, phone contact was made by the parents to the Muscogee County School District and a meeting scheduled for August 23, 1985. At this meeting, referred to by the Muscogee County School District as a "staffing" the child was identified as profoundly mentally handicapped and it was concluded that she is eligible for profoundly mentally handicapped services and a recommendation of profoundly mentally handicapped self-contained at the Department of Human Resources Columbus Service Center. Minutes were recorded during this meeting but no IEP was developed.

The parents disagreed with the recommended placement and notified the Muscogee County School District of the same. Two subsequent meetings were held, on September 6, 1985 and September 30, 1985 and again placement at the Department of Human Resources Columbus Service Center was recommended and neither was an IEP developed or the March 15, 1984 IEP implemented.

On September 18, 1985, the parents enrolled their child in the Department of Human Resources Columbus Service Center on a temporary basis and thirty (30) days later on October 7, 1985, an Individualized Program Plan (IPP) was developed for the child based on assessments by the child's Instructor at the Service Center and the physical therapist and the occupational therapist of the Muscogee County School District.

On October 12, 1985, the parents, by and through their attorney, requested a due process hearing which was not acted upon by the Muscogee County School

District contending that only a parent or the Local Educational Agency (LEA) may request a hearing under the law.

By letter dated October 22, 1985, the parents were notified by the Muscogee County School District that the current IEP dated April 4, 1985 had been received from the North East Independent School District and that it would be implemented as a 20-day temporary IEP as of October 23, 1985 at the Department of Human Resources Columbus Service Center and that a permanent IEP would be developed and implemented on November 12, 1985 provided the parents consent to have their child tested and evaluated by the Muscogee County School District. The parents provided the School District with the required consent and the child was/is currently being tested and evaluated.

On November 4, 1985, the Muscogee County School District notified the State Department of Education of the parents' request for a due process hearing after it (School District) had received certain information from the parents and a hearing was originally scheduled within twenty days of that date on November 24, 1985. By agreement of the parties the 20-day time period of November 4, 1985 was waived and the hearing scheduled for December 4, 1985.

The parents contend first that their due process rights have been violated in that the Muscogee County School District failed or refused their request for a due process hearing on October 12, 1985 and thus the time lines have been violated under public law 94-142. The parents further contend that the School District has failed

or refused to provide their child with a free appropriate education in the least restrictive environment.

II. ISSUE(S)

Whether the time lines for the due process hearing were violated in that a hearing was not scheduled twenty days from October 12, 1985, the date the parents contend that the hearing was requested.

Whether the Muscogee County School District has failed to provide the child with a free appropriate education in the least restrictive environment.

III. FINDING OF FACTS

1. The parents contacted the Muscogee County School District prior to their arrival to Columbus on June 1, 1985 in an attempt to determine where the School District had a special education program suitable for their child. (Testimony, K. Mitten, Vol. I, pages 21 through 67; A. Mitten, Vol. B, pages 195 through 225; Barnes, Vol. B, pages 228-238; Exhibit P-16)

2. The parents provided the Muscogee County School District with an IEP dated March 15, 1984 with an annual review date of March 15, 1985 along with assessment and evaluation data dated February, 1984 used to develop it upon their arrival. (Testimony, K. Mitten Vol. I, pages 21 through 67; A. Mitten, Vol. B, pages 195 through 225; Means, Vol. B, pages 238 through 286; Stola, Vol. II, pages 84 through 145)

3. The parents executed the required release of documents form to allow the School District to receive a

more current IEP but refused to allow their child to be further tested and evaluated by the Muscogee County School District prior to October 29, 1985. Written consent for testing was received by the Muscogee County School District on November 6, 1985. (Respondent's Exhibits 66, 67, and 68)

4. Mrs. Mitten attended an initial meeting with the Muscogee County School District on August 23, 1985 chaired by Wayne Means, Special Education Consultant for the Moderately Mentally Handicapped, Mildly Mentally Handicapped, Orthopedically Mentally Handicapped and Severely Mentally Handicapped, and attended by Dr. David a Stola, Director of Special Education, Rochelle Spandofer, School Psychologist, and Terry Brock, Director of the Department of Human Resources Columbus Service Center. Based on the information provided, as set out in number 2 above the child was indentified as profoundly mentally handicapped and an eligibility report was completed concluding that the child is eligible for profoundly mentally handicapped services, and recommended a profoundly mentally handicapped self contained program at the Department of Human Resources Columbus Service Center. The committee also concluded that the IEP dated March 15, 1984 would not be implemented and did not develop a new IEP for the child. (Testimony, K. Mitten, Vol. I, pages 21 through 67; Stola, Vol. II, pages 84 through 145; Means, Vol. B, pages 238 through 286; Respondent's Exhibits 53, 64 and 64A)

5. Two subsequent meetings were held with the Muscogee County School District on September 6, 1985 and on September 30, 1985 with both parents present and based on the information previously provided, and the

Cooperative Agreement between the State Department of Education and Department of Human Resources dated August 19, 1985, the child was again recommended to be placed at the Department of Human Resources Columbus Service Center. An IEP was not written at either meeting and neither was the 1984 IEP implemented. (Testimony, K. Mitten, Vol. I, pages 21 through 67; A. Mitten, Vol. B, pages 195 through 225; Stola, Vol. II, pages 84 through 145; Means, Vol. B, pages 238 through 286)

6. At the meeting dated September 30, 1985, the lawyer for the Muscogee County School Distrtict was present and the parents were represented by Patricia M. Smith, attorney at law. Subsequent to this meeting, by letter dated October 2, 1985, Ms. Smith wrote a letter to Dr. Stola advising that she would take all necessary actions to obtain a free appropriate education for the child. (Tape Exhibit 18; Parents Exhibit 14)

7. None of the teachers, or auxillary personnel (aides and paraprofessionals) at the Department of Human Resources Columbus Day Service Center hold valid certificates as required by the State Department of Education. (Testimony, Brock, Vol. I, pages 126 through 167; Harrington, Vol. II, pages 49 through 84)

8. An up-dated IEP (April 4, 1985) was received from the North East Independent School District by the Muscogee County School District in mid-October and the parents were notified by letter dated October 22, 1985, that it would be implemented as of October 23, 1985 as a 20-day temporary IEP at the Department of Human Resources Columbus Service Center and that a permanent IEP would be developed by November 12, 1985.

(Respondent's Exhibits 71 and 72; Testimony, Stola, Vol. II, pages 84 through 145)

10. The parents enrolled the child in the Department of Human Resources Columbus Service Center on September 18, 1985 and on Otober 7, 1985 and IPP was developed. (Testimony, Harrington, Vol. II, pages 49 through 84; K. Mitten, Vol. I, pages 21 through 67; A. Mitten, Vol. B, pages 228 through 238; Parents Exhibit 17)

IV. CONCLUSIONS AND REASONS FOR DECISION

It is common practice in our society for persons to retain and/or empower lawyers to act on their behalf in legal disputes. The evidence establishes that at least by September 30, 1985, Patricia M. Smith, attorney at law, was retained by the parents in this case to represent them on their contentions that the Muscogee County School District was refusing to write and/or implement an IEP for their child and for refusing to place their child in a special education program in one of the public schools as she personally appeared at a meeting with representatives from the Muscogee County School District including its lawyer on this date. Susbsequent to this meeting, Ms. Smith advised Dr. Stola, Director of Special Education, in a letter confirming her interpretation of the meeting of September 30, 1985, and notifying him that "we will take all necessary actions to obtain a free and appropriate education for (the child)", which is this Hearing Officer includes initiating an impartial due process hearing on behalf of the parents. Without some indication by the Muscogee County School District that it had knowledge or information that Ms. Smith was no longer representing

the parents or that perhaps another lawyer or advocate were or would be representing the parents, the contention by the Muscogee County School District that it needed authorization from the parents that Ms. Smith was representing them for the purpose of requesting a due process hearing makes no sense. The letter by Ms. Smith dated October 12, 1985, was sufficient to request a hearing on behalf of the parents and documentation that she represented the parents.

A hearing must be provided if the parents request it with regard to the identification, evaluation, placement, or provision of a free appropriate public education to handicapped children, 34CFR section 506 (a); *Georgia Department of Education/Regulations and Procedures,* IDDfd 3-2, and the hearing must occur within twenty calendar days of the receipt of the official request. *Georgia Department of Education/Regulations and Procedures,* IDDFd 3-3. The issues regarding this child involve a provision of free appropriate public education and a hearing should have been scheduled twenty days of the receipt of the notice.

In this case the Muscogee County School District failed to schedule a hearing within the time provided by law and the due process time lines have been violated.

The State of Georgia, State Board of Education has an essential responsibility to provide appropriate educational opportunities to all children and youth including those exceptional children whose school achievement or adjustment is hindered due to emotional, physical, communicative or intellectual deviations, or a combination thereof. *Georgia Department of Education/Regulations and Procedures,* IDDFal. Each school system shall provide a

free appropriate public education for handicapped students requiring special education and related services. In order to be eligible for related services, a handicapped student must first meet eligibility requirements in one of the program areas. Such a determination shall be made by the local placement committee and services shall be provided as specifed in the student's IEP. *Georgia Department of Education/Regulations and Procedures,* IDDFd-34.

The evidence shows that at the meeting dated August 23, 1985, referred to by Mr. Means and Dr. Stola as "a staffing", eligibility for the child was determined and it was concluded that the child is eligible for profoundly mentallly handicapped services. It was not unreasonable for the Muscogee County School District to refuse to implement the 1984 IEP, as it was approximately eighteen months old. However, since it was determined that the child was eligible for services in one of the program areas, profoundly mentally handicapped, an IEP should have been developed before recommending placement at the Department of Human Resources Columbus Service Center. Eligibility does not dictate placement. Implementation of the goals and objectives as set out in the IEP determines placement.

The evidence clearly established that the child is non academic and is functioning on an 8 month level; that the child is non verbal, visually handicapped, cannot walk, crawl, or feed herself, and is not toilet trained. The evidence shows that the child received special education in the Texas Public School System beginning during the 1981-82 school year and that for each school year up to April 4, 1985 and IEP was developed. Testimony by Mr. Means and Dr. Stola indicates that the reason that an IEP

was not written for the child was because no "educational goals" could be determined and that the goals and objectives contained in the child's previous IEP are "training goals and objectives". The term "individualized education program" means a written statement for each handicapped child to meet the unique needs of the student. . . .the statement shall include (A) a statement of the present level of educational performance of such child, (B) a statement of annual goals including short term instructional objectives, (C) a statement of the specific educational services to be provided for the child and the extend to which such child will be able to participate in regular education, (D) the projected date and initiation of and anticipated duration of such services, and (E) appropriate objectives criteria and evaluation procedures and schedules for determining on a least annual basis whether such instructional objectives are being achieved. 20 USC 1401 (19). In the development of an IEP, as brought out in the testimony of Dr. Stola and Dr. Jordan and as provided in the IEP Resource Guide, all pertinent information must be discussed concerning the child such as academic achievement, adaptive behavior, psychomotor skills, self-help, language skills, and other arears assessed through screenings, group and individual testing, observations, case history review and parental concerns. There is nothing in the definition of the term "individualized education plan", or in the IEP Resource Guide which defines or distinguishes an "educational goal" from a "training goal" and neither could the Muscogee County School District do so. It appears from the evidence that the Muscogee County School District is using the Cooperative Agreement between Department of

Education and Department of Human Resources dated August 19, 1985 to make such distinction and it (Agreement) does not. The Agreement recognizes the fact that some children may be served best in settings other than the public school. . . . including a Department of Human Resources operated or contracted agency. The Agreement further points out that the Department of Education through the Local Education Agency shall provide special education and related services to handicapped children served in the Department of Human Resources operated or contracted agencies in *accordance with the child's IEP* at no cost to the parents.

It is unclear from the evidence whether the Muscogee County School District explained to the parents prior to October 22, 1985 that an IEP would have been written for the child if they had consented to additional testing. The overwhelming evidence establishes that the Muscogee County School District did not develop or implement an IEP for the child on the basis that no "educational goals" could be determined.

An IEP is developed for each handicapped child who is receiving or will receive special education, *Georgia Department of Education/Regulations and Procedures* IDDFd3-13, and the Muscogee County School District failed to do so prior to October 23, 1985. Even though the child had been determined eligible for services in one of the program areas as defined in Section VI of the *Georgia Department of Education/Regulations and Procedures.*

There is nothing in State or Federal law which precludes placement of a student in a restrictive placement

such as a Day Service Center. The Cooperative Agreement specifically provides a Department of Human Resources Service Center as a continuum of alternative placement for a handicapped child. Special education classes, separate schooling and other removal of handicapped children from the regular class environment shall occur only when the nature of the severity of the handicap is such that education in the regular classes with the use of supplementary aides and services cannot be satisfactorily achieved. *Georgia Department of Education/Regulations and Procedures,* IDDFd3-6.

While the Muscogee County School District does serve four other children identified as profoundly mentally retarded in the public school setting, the evidence shows that their range of functional levels are higher than that of the child in this case. There is no question that the child is physically and mentally limited and is dependent with all self help skills (eating, dressing, tolietry, etc.) The evidence establishes that even though the child likes to have her hair brushed, is able to let you know when she is uncomfortable, likes music, and responds to light, it is uncertain at this time whether she is actually aware of her environment. Because of the severe limitations imposed by the child's handicapping conditions, contact with others in a regular education environment would be minimal. In this case removal of the child from the regular education school environment may be appropriate.

34CFR Section 300.4(b) defines a free appropriate public education as special education and related services which meet the standards of the state educational agency. The child is currently temporarily placed at the Department of Human Resources Columbus Service Center in a

class ranging from 8 to 12 students on a given day with an Instructor and an Instructional Aide. There are no teachers at the Center and none of the Instructors or Instructional Aides are certified in accordance with the standards of the State Department of Education. The IEP provides for the child to receive occupational therapy three times per week for 15 minutes, speech therapy two times per week with consultation with the teacher, and physical therapy based on the Physical Therapist's recommendations and with consultation with teacher. The Speech Therapist, Occupational Therapist and the Physical Therapist are certified teachers with Muscogee County School District under the Georgia Department of Education.

The evidence shows that the Speech Therapist, Occupational Therapist and Physical Therapist all provide instructions to the child's Instructors and Aides regarding the child's goals and objectives as outlined in her IEP.

First, the Cooperative Agreement provides that services delivered to handicapped children at Department of Human Resources operated agency be delivered in accordance to the Department of Education Program for Exceptional Children Rules and Regulations. The *Georgia Department of Education/Regulations and Procedures* recommends the maximum enrollment for a self-contained severely/profoundly mentally handicapped student be 4 to 6 students and further recommends that paraprofessionals/aides be utilized to provide appropriate individualized programming.

Secondly, in *Tomika M. Vs. Jasper County Board of Education*, Case number 1985-34, the State Hearing Officer ruled as follows:

> Because the Day Service Center personnel are not certified or licensed by the State Department of Education, the program offered to the student does not meet the standards of the State Educational Agency and therefore does not comply with 34CFR Section 300.4. In order for placement to comply with that requirement, the local system must provide for implementation of the Student's IEP by a certified teacher and services from aides and paraprofessionals to be provided by individuals who are licensed to provide those services. Certified teachers may not need to be present in the service center at all times if the teacher determines that the program can be implemented by licensed aides. How the program is implemented is an instructional decision which needs to be made by the teacher.

This hearing officer is bound by that decision, and concludes that the program offered to the child at the Department of Human Resources Columbus Service Center does not meet the standards of the State Educational Agency and is not in compliance with the law.

V. DECISION

In view of the above findings and the evidence considered my decision is that (1) the Muscogee County School District violated the time lines by not scheduling a due process hearing within twenty days from the receipt of the official notice from the parents' attorney; and (2) that the Muscogee County School District failed to provide the child a free appropriate education in that it

failed to develop or implement an IEP for the child prior to October 23, 1985 and that the placement is not consistent with the regulations requiring that the child be provided an education which meets the standard of the State Education Agency because the State Board of Education standards require that teachers be certified and auxillary personnel be licensed.

This 31 day of December, 1985.

/s/ Mary A. Buckner
MARY A. BUCKNER
Regional Hearing Officer

P.O. Box 709
Columbus, Georgia 31902

STATE BOARD OF EDUCATION
STATE OF GEORGIA

IN RE: PAIGE M. and MUSCOGEE COUNTY SCHOOL BOARD	))))	CASE NO. 1986-2 DECISION OF STATE HEARING OFFICER

PART I

SUMMARY OF APPEAL

This is an appeal by the Muscogee County School Board (hereinafter "Local Board") from a decision of a Regional Hearing Officer that, with respect to Paige M. (hereinafter "Student"), the Local Board failed to comply with the due process timelines and that the program offered to the Student does not meet the standards of the State Educational Agency and is not in compliance with the law. The Local Board contends on appeal that it offered the Student a free, appropriate public education and did not fail to meet the timelines for a due process hearing.

PART II

FACTUAL BACKGROUND

The Student is a nine-year old female who is multiple handicapped, has cerebral palsy, a visual handicap and is nonverbal and non-ambulatory. She cannot sit alone, feed herself, walk or crawl, and is not toilet trained.

The hearing below resulted from a disagreement between the parents and the Local System regarding the Student's placement. The Local System contended that the Student should be placed in a community service

center, while the parents contended the Student should be placed in the Local System. An additional issue was raised when the Local System did not set up a hearing immediately upon the request of the parents' attorney because the Local System wanted confirmation by the parents that the attorney was authorized to request the hearing.

The Regional Hearing Officer decided that the Local System violated the timelines by not scheduling a due process hearing within twenty days after receipt of the official notice from the parents' attorney. The Regional Hearing Officer also decided that the Local System failed to provide a free, appropriate public education because: (1) it failed to develop an I.E.P. for the Student prior to October 23, 1985, and (2) the placement is not consistent with the regulations which require the Student to be provided an education which meets the standards of the State education agency since those standards require that teachers be certified and auxiliary personnel be licensed. The Regional Hearing Officer's decision was issued on December 31, 1985.

PART III

DISCUSSION

The Local Board contends that 34 C.F.R. §300.4 does not require a certified or licensed aide to be provided, and that the Federal Regulations expressly recognize, in 34 C.F.R. §300.12, the use of individuals with comparable qualifications rather than requiring individuals certified or licensed by the State Department of Education. The Local Board is correct that 34 C.F.R. §300.4 does not, by

itself, require the use of individuals certified or licensed by the State Department of Education. That regulation requires that the program offered to the student consist of special education and related services which:

> (b) meet the standards of the State educational agency, including the requirement of this part . . .
>
> (c) . . . , and
>
> (d) are provided in conformity with an individualized education program which meets the requirements [of the regulations].

Because 34 C.F.R. §300.4(b) requires that the program offered to the student must meet the standards of the State Department of Education, one must look to the State Department of Education to determine whether the program offered by the Local Board meets those standards and is, therefore, in compliance with 34 C.F.R. §300.4(b). It is true, as the Local Board argues, that 34 C.F.R. §300.12 states:

> the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or realted services.

The Local Board argues that 34 C.F.R. §300.12 means that, if the Local Board can demonstrate that the individuals providing special education to the student have comparable qualifications, then they are qualified to provide special education to the student. However, 34 C.F.R. §300.12 is not as flexible as the Local Board argues. 34 C.F.R. §300.12 requires the person to meet State educational agency recognized requirements. The individuals in the

service center may have excellent training and experience, but §300.12 requires that, in order for those individuals to be qualified, they must have qualifications approved or recognized by the State Department of Education. §300.12 is consistent with the requirements of 34 C.F.R. §300.4 which requires that the program meet the standards of the state educational agency. Both §300.4 and §300.12 require the State Department of Education to develop prior ascertainable standards which programs must meet and which personnel must meet. Consistent with §300.4, the State Department of Education has developed Standards for Public Schools in Georgia, Standards for Private Schools in Georgia, and regulations which also set standards or requirements for programs and personnel. The Public School Standards require:

> 21. All professional personnel employed in the system hold valid Georgia certificates.
>
> 22. All auxiliary personnel employed in the system hold valid licenses.

The Private School Standards require all professional personnel who instruct or supervise students to hold appropriate Georgia certification or be in the process of acquiring certification. *Standards for Private Schools Offering Special Education Programs for Public School Assigned Handicapped Students*, July 1, 1982, Standard 8. State Department of Education Regulations and Procedures require that related services be provided by certified or licensed personnel as required by state laws or regulations. The Local Board has not shown, and the State Hearing Officer is unaware of, any other standards or regulations issued by the State Department of Education.

The thrust of the State Department of Education's standards and regulations is that State Department of Education certified or licensed personnel must be used to provide *educational services*. While the State Department of Education could, under 34 C.F.R. §300.12, broaden their regulations to approve or recognize other comparable requirements, its current standards and regulations have not done so except with respect to the provision of *related services*, which may be provided by certified or licensed personnel as required by state laws or regulations. Thus, only in the provision of related services may individuals not certified or licensed by the State Department of Education be used.

The requirement that State Department of Education certified or licensed personnel must be used to provide educational services has been previously enunciated in *Tomika M. v. Jasper Cnty. Bd. of Ed.*, Case No. 1985-34, which the Local Board argues was incorrectly decided. In that case, the local board placed a student in a service center, similar to this one, in which the personnel were not certified or licensed by the State Board of Education. The student's I.E.P. in *Tomika M.* called for the provision of a certified teacher. As a result, the student in *Tomika M.* would have been provided educational services without a State Department of Education certified teacher or licensed aide. For the reasons discussed above, *Tomika M.* held that program was inappropriate and, for those same reasons, the holding in *Tomika M.* still stands.

The Local Board, in effect, argues that there are no applicable standards once a student is placed into a service center. This argument, however, is inconsistent with the federal and state regulations discussed above. The

Local Board is responsible for providing the Student with an appropriate education. An appropriate education is one which is provided in conformity with the Student's I.E.P., and which meets the standards of the State educational agency. In order to meet the standards of the State educational agency, some standards must exist. In the instant case, the Local Board has not developed an I.E.P., nor has it demonstrated that it can provide a program which meets the standards of the State Department of Education.

The burden of demonstrating that the Local Board has provided a program which meets the standards of the State Department of Education is on the Local Board. The Local Board is advocating a placement which is in a more restrictive environment than the regular school program. Where a local board proposes placement in a more restrictive environment, the burden is on that local board to show that placement is appropriate. *See, Wesley B. v. Murray Cnty. School District*, C83-349R (U.S.D.C. N.D. Ga., Rome Div.). The Local Board is in a better position to demonstrate its proposed placement meets the standards of the State Department of Education than the parents. The Local Board is more knowledgeable about the state standards than the parent and it is more knowledgeable about its own program than the parents.

The fact that the Local Board has the burden of proving that its program meets State Department of Education standards does not mean that placement can never be in a service center or that every individual working in a service center has to be a certified teacher or licensed aide. The service center is a facility and not a program.

While personnel at a facility may play a part in a program, they also may not be necessary to implement an educational program. The I.E.P. will define the program the student receives. It will include the educational services and the related services necessary to provide an appropriate education to the student. In order for the program to meet the standards of the State Department of Education, the *educational services* required by the I.E.P. must be provided by personnel certified or licensed by the State Department of Education and the *related services* must be provided by certified or licensed personnel as required by state laws or regulations. Placement could be in a service center if the educational services required by the I.E.P. are provided by State Department of Education certified personnel or licensed aides, and the related services are provided by certified or licensed personnel as required by state laws or regulations. The fact that the service center may also provide custodial or maintenance services with non-certified and non-licensed personnel, which services are in addition to the educational services and related services required by the I.E.P., would not violate the requirement that the program offered pursuant to the I.E.P. must meet the standards of the State Department of Education. As with all I.E.P.s, educational decisions must be made by the I.E.P. committee to determine what educational and related services are necessary to provide the student with an appropriate education.

The Student's parents contend that O.C.G.A. §20-2-186, O.C.G.A. §20-2-690, and O.C.G.A. §20-2-283 require certified teachers to be present at all times with the Student, and they have made a motion to enforce the decision of the Regional Hearing Officer. O.C.G.A.

§20-2-186, however, concerns the aides' authority of "in loco parentis" and does not require certified teachers to be present at all times. Indeed, it specifically recognizes that teachers may not be with students at all times and may be involved in other educational activities. O.C.G.A. §20-2-690 concerns compulsory school attendance and, while it does require parents who teach their children at home to have a baccalaureate degree, that section is inapplicable to the case at hand. O.C.G.A. §20-2-283 relates to the qualifications of substitute teachers in classrooms and does not require that those substitutes always be present with all students any more than O.C.G.A. §20-2-186. The Student's parents' arguments, therefore, also do not change the requirements set forth in the preceding paragraphs.

Appellant's motion to enforce the Regional Hearing Officer's decision is outside the purview of the State Hearing Officer's authority. Each decision of a regional hearing officer or the State Hearing Officer stands on its own. Enforcement of those decisions is a matter for the State Department of Education or the courts.

The Local Board also contends that it was not in violation of the timeline requirements when it failed to call for a hearing upon request of counsel for the parents because, at that time, the Local Board had no notice from the parents that counsel had been retained. The Regional Hearing Officer determined that the request of the parents' attorney for a hearing was sufficient in light of the fact that the attorney had attended a meeting on behalf of the parents with local system employees and the Local Board's attorney, and had previously written a letter to the Director of Special Education of the Local Board on

behalf of the parents. The State Hearing Officer concurs with the Regional Hearing Officer that the letter from counsel was sufficient to request a hearing. Thus, the Local Board was responsible for a violation of the timelines.

PART IV

DECISION

Based upon the foregoing discussion, the record presented, and the briefs and arguments of counsel, the State Hearing Officer is of the opinion that the Local Board failed to demonstrate it offered the Student an appropriate program and that the Local Board was responsible for violating the timelines when it failed to request a hearing upon request of the parents' counsel.

The decision of the Regional Hearing Officer, to the extent it is consistent with this decision, is hereby

SUSTAINED.

This 6th day of March, 1986.

/s/ L. O. Buckland
L. O. BUCKLAND
STATE HEARING OFFICER

No. 89-905

Supreme Court, U.S.
FILED
JAN 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MUSCOGEE COUNTY SCHOOL DISTRICT, MUSCOGEE COUNTY BOARD OF EDUCATION, AND DR. BRAXTON A. NAIL, SUPERINTENDENT OF SCHOOLS FOR MUSCOGEE COUNTY,

Petitioners,

v.

PAIGE MITTEN, BY AND THROUGH HER FATHER AND NEXT FRIEND, ALAN MITTEN, AND ALAN MITTEN, INDIVIDUALLY,

Respondents.

BRIEF OF PAIGE MITTEN AND ALAN MITTEN AS RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JONATHAN A. ZIMRING*
EDWARD L. GREENBLATT

Counsel for Respondents Paige Mitten and Alan Mitten

*Counsel of Record

LIPSHUTZ, GREENBLATT & KING
2300 Harris Tower
233 Peachtree Road
Atlanta, Georgia 30043
(404) 688-2300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 9

I. THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED, AS CONTRARY TO THE ASSERTION OF THE PETITIONERS, THERE IS NO SPLIT IN THE CIRCUITS ON THIS ISSUE. THIS RULING IS CONSISTENT WITH THE INTENT OF THE STATUTE, THE LEGISLATIVE HISTORY AND THE LANGUAGE OF THE STATUTE 9

A. There Is No Split In The Circuits 9

B. The Eleventh Circuit Court of Appeals Properly Ruled That The HCPA Grants A Claim For Administrative Fees 11

II. THE PETITIONERS ASSERTION THAT THE ELEVENTH CIRCUIT COURT OF APPEALS USED THE WRONG LEGAL STANDARD TO DETERMINE WHETHER THE FAMILY HAD PREVAILED, I.E., HOLDING RESPONDENTS HAD OBTAINED SUBSTANTIAL RELIEF INSTEAD OF UTILIZING A "CENTRAL ISSUE" TEST IS WITHOUT MERIT. THE COURT OF APPEALS PROPERLY APPLIED THE *HENSLEY v. ECKERHART* STANDARD 14

TABLE OF CONTENTS – Continued

Page

A. The Standard Of Review Is The *Hensley v. Eckerhart* Standard of Substantial Relief.... 15

B. The Plaintiffs Prevailed On A Significant Issue In The Litigation And Obtained Some Of The Relief They Sought..... 16

III. THERE ARE NO SPECIAL CIRCUMSTANCES WHICH EXIST TO DENY THIS FAMILY A RIGHT TO ATTORNEYS FEES 19

IV. THE IMPLEMENTATION DATE OF THE HCPA GRANTING A RIGHT TO ATTORNEY'S FEES FOR THE LIMITED NUMBER OF CASES RESOLVED BETWEEN *SMITH V. ROBINSON* AND THE ENACTMENT OF THE HCPA IN AUGUST OF 1986 DOES NOT VIOLATE THE SPENDING POWER CLAUSE OR THE SEPARATION OF POWERS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES. 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Arons v. New Jersey State Board of Education, 842 F.2d 58 (3rd Cir. 1988) 9

Barbara R. v. Tirozzi, 665 F.Supp. 141 (D.Conn. 1987) 27

Blum v. Stenson, 465 U.S. 886 (1984) 22

Board of Education v. Rowley, 458 U.S. 176 (1982) 27

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1973) 27

Brown v. McGarr, 774 F.2d 777 (7th Cir. 1985) 25

Burke v. Guiney, 700 F.2d 767 (1st Cir. 1983) 20

Capello v. District of Columbia Board of Education, 669 F.Supp. 14 (D.C. 1987) 26

Christiansburg Garment Company v. EEOC, 434 U.S. 412 (1978) 20

Concerned Democrats of Florida v. Reno, 601 F.2d 891 (11th Cir. 1979) 20

Counsel v. Dow, 849 F.2d 731 (2nd Cir. 1988), *cert. denied*, 488 U.S. ___, 109 S.Ct. 391, 102 L.Ed. 2d 380 (1988) 9, 23, 26, 27, 28

Chang v. Board of Educ. of Glen Ridge TP., 685 F.Supp. 96 (D. N.J. 1988) 14

Duane M. v. Orleans Parish School Board, 861 F.2d 115 (5th Cir. 1988) 9, 12, 13

Eggers v. Bullit Coun[illegible] School Board, 854 F.2d 892 (6th Cir. 1988) 9, 12, 13, 22

TABLE OF AUTHORITIES – Continued

Page

Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983) 20

Fontenot v. Louisiana Bd. of Elem. and Second. Educ., 835 F.2d 117 (5th Cir. 1988).....20, 27

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)..... 27

Gautreaux v. Chicago Housing Authority, 690 F.2d 601, (7th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983) 20

Georgia Association for Retarded Citizens v. McDaniel, 855 F.2d 805 (11th Cir. 1988), *cert. denied*, 489 U.S. ___, 109 S.Ct. 2431 (1989).....6, 23

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 22

Hensley v. Eckerhart, 461 U.S. 424 (1983) .6, 7, 14, 15, 16

Hewitt v. Helms, 482 U.S. 757 (1987)..... 19

Honig v. Doe, 488 U.S. ___, 108 S.Ct. 592, 98 L.Ed 2d 686 (1988).....26, 27

Hutto v. Finney, 437 U.S. 678 (1977) 22, 27

International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502 (5th Cir. 1980)..... 22

J & J Anderson, Inc. v. Erie, 767 F.2d 1469 (10th Cir. 1985)..... 20

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) 27

Jones v. Reagan, 748 F.2d 1331 (9th Cir. 1984) 25

Lauren T. v. Crisp County, SBE 1986-28..... 4

Leonard v. Argento, 699 F.2d 874 (7th Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) 22

Manacke v. School Board of Pinnelas County, Fl., 762 F.2d 912 (11th Cir. 1985)..... 27

TABLE OF AUTHORITIES – Continued

Page

Mathern v. Campbell County Children's Center, 674 F.Supp. 816 (D. Wyo. 1987) 14

McCormack v. Burlington Elementary School District, C-88-0141 (JPO) (N.D. Cal. 1988) 10

McSomebodies v. Burlington Elementary School District, 886 F.2d 1559 (9th Cir. 1989) 9, 10

Miami Herald Publishing Company v. City of Hallandale, 742 F.2d 590 (11th Cir. 1984) 15

Mitten by and through Mitten v. Muscogee County School District, 877 F.2d 932 (11th Cir. 1989) ... *passim*

Moore v. District of Columbia, 886 F.2d 1335 (D.C. Cir. 1989) 9, 10

Moore v. District of Columbia, No. 88-7003 (D.C. Cir. November 22, 1989) 10

Morrow v. Stewart, 580 F.2d 1284 (5th Cir. 1978) 20

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 15

New York Gas Light Club v. Carey, 447 U.S. 54 (1980) .11, 13

North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 6 (1986) 5, 11, 12, 14

Odum v. Clark, 748 F.2d 1538 (11th Cir. 1984) 15

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 6, 26, 27, 28

Pension Benefit Guaranty Corp. v. Gray & Co., 467 U.S. 717 (1984) 24, 25

Popham v. City of Kennessaw, 820 F.2d 1570 (11th Cir. 1987) 15

TABLE OF AUTHORITIES – Continued

Page

Prescott v. Palos Verdes Peninsula Unified School Dist., 659 F.Supp. 921 (N.D. Cal. 1987) 10, 11

Rhodes v. Stewart, 488 U.S. ___, 109 S.Ct. ___, 102 L.Ed 2d 1 (1989) 19

Rollison v. Biggs, 660 F.Supp. 875 (D.Del. 1987) 10

Sch. Bd. of Prince William County v. Malone, 662 F.Supp. 999 (E.D. Va. 1987) 26

Serafina v. San Mateo City School District et al., C-88-0799 (JPO) (N.D. Cal. 1989) 9

Smith v. Robinson, 468 U.S. 992 (1984) 8, 23, 26, 27

Temple University v. United States, 769 F.2d 126 (3rd Cir. 1985) 25

Texas Teachers Association v. Garland Ind. Sch. Dist., 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed. 2d 866 (1989) ..... *passim*

Tonya K. By Diane K. v. Bd. of Educ. of Chicago, 847 F.2d 1243 (7th Cir. 1988) 24

Turton v. Crisp County Sch. Dist., 688 F.Supp. 1535 (M.D. Ga. 1988) 27

Unified Sch. Dist. No. 259 v. Newton, 673 F.Supp. 418 (D.Kan. 1987) 11, 13, 26, 27

United States v. Darusmont, 449 U.S. 292 (1981) 25

United States v. Locke, 471 U.S. 84 (1983) 25

United States v. Sioux Nation of Indians, 44 U.S. at 371 (1980) 25

Usery v. Turner Elkhorn Mining Company, 428 U.S. 1 (1976) 24

TABLE OF AUTHORITIES – Continued

Page

Webb v. Dyer County Board of Education, 471 U.S. 234 (1985) 13

Williams v. Boston School Committee, 709 F.Supp. 27 (D.Mass. 1989) 11

Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985) 15

Yaris v. Special Sch. Dist., 661 F.Supp. 996 (E.D. Mo. 1987) 27

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT

Fourteenth Amendment To The United States Constitution 6, 8, 26

Developmentally Disabled Bill of Rights Act, 42 U.S.C. § 6010 27

Education For All Handicapped Children's Act of 1975, as amended, 20 U.S.C. §§ 1401 et seq. .. *passim*

Federal Land Policy and Management Act, 43 U.S.C. § 1701, Pub. L. 94-579, 90 Stat. 2743 25

Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, 20 U.S.C. § 1415(e) 4, 7

Rule 17 (1)(a) of the Rules of the Supreme Court 10

Title IV of the Employment Retirement Income Security Act, 29 U.S.C. § 1301 24

Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d 12

Title VII of the 1964 Civil Right's Act, 42 U.S.C. § 2000e 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

30 U.S.C. §§ 901 et seq. 24

20 U.S.C. § 1401(18) 1, 7, 17

20 U.S.C. § 1415 4

42 U.S.C. § 1988 ..... 6, 11, 12

O.C.G.A. ch. 37-6 Day Car Centers For The Mentally Retarded 2

FEDERAL REGULATIONS

34 C.F.R. § 300.122 3

34 C.F.R. § 300.124 3

34 C.F.R. § 300.600(b) 3

OTHER MATERIALS

Handbook of Practice and Internal Operating Procedures and Rules, D.C. Circuit, August 1, 1987 10

Hockman, "The Supreme Court and the Constitutionality of Retroactive Legislation", 73 Harv. L.Rev. 692 (1960) 24

H. Rep. 99-296, 99th Cong., 1st Sess. (1985) 13, 16

H. Cong. Rep. 99-687, *reprinted in part*, U.S. Cong. & Admin. News, 99th Cong., 2nd Sess., 1799 (1986) 13

Schreck, "Attorney's Fees For Administrative Proceedings Under The Education Of The Handicapped Act: of *Carey, Crest Street* And Congressional Intent", 60 Temple Law Quarterly 599 (1987)..... 13

S. Rep. 99-112, *reprinted in*, U.S. Cong. & Admin. News, 99th Cong., 2nd Sess., 1799 (1986) 13

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported as *Mitten by and through Mitten v. Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989). It is also set out in the Petitioners' Appendix at App. 1-13. The order denying rehearing is unreported. The administrative decision of the Regional Hearing Officer of December 31, 1985 is in Petitioners' Appendix at 18-35, the State Hearing Officer decision is at Appendix 33-41, and the trial court opinion is at App. 14-17.

STATEMENT OF THE CASE

The Respondent Paige Mitten believes the Petitioners' Statement of the Case is misleading and finds it necessary to restate the case.

Paige Mitten, now thirteen, is a multiple handicapped child, who in addition to cerebral palsy, blindness, and lack of adequate speech and ambulatory skills has severe mental retardation. (App. 3; 18-19). The Mitten family moved from Texas to Georgia, being transferred by the military prior to the beginning of the 1985-86 school year. In Texas Paige had received public special education and related services under the Education For All Handicapped Children's Act of 1975, as amended, 20 U.S.C. §§ 1401 *et seq.* ("EHA"). Upon attempting to enroll their child in the Muscogee County School District they were denied services. (App. 22-3). Muscogee County did not write an individual educational program (IEP), as required by the EHA after the parents requested several

meetings. *See*, Fact Finding No. 4 at App. 22. In lieu of providing services or assuming responsibilities for services, they simply referred the student to a "day care center" run by the Georgia Department of Human Resources. *See*, O.C.G.A. ch. 37-6, Day Care Centers For The Mentally Retarded. That center did not use certified teachers, certified or licensed therapists, did not follow educational standards and as a matter of policy and practice did not follow Georgia's special education rules and regulations. *See*, Fact Finding No. 7 at App. 23; App. 30. The Muscogee County Petitioners expressly and directly refused to provide special education services or assure their provision as required under the EHA.

The 1985-86 school year began with Paige receiving no educational services under the EHA. The family therefore requested an administrative hearing (through counsel) under the EHA to adjudicate and correct Petitioners improper actions. The Petitioners initially refused to acknowledge the family's counsel's request for a hearing and no hearing officer was appointed. The result was additional delays in providing Paige appropriate educational services. Later the Petitioners agreed to provide related services personnel only, that is licensed therapists for a small portion of Paige's educational program but refused to comply with the placement requirements under the EHA or provide teachers. Still later, in the administrative hearings the Petitioners took the position that a contract between the Georgia Department of Education and the Georgia Department of Human Resources permitted this conduct. Contrary to Petitioners' assertion, this contract was not the first contract between these agencies but was simply a successor to contracts effect

since 1978, the first enforcement date of the EHA. *See*, 34 C.F.R. §§ 300.122, 300.124 and 300.600(b). The contract did not permit the actions taken as it expressly required that an IEP be written and that Paige receive special education services and not merely health or day care services. (App. 30-1).

The Petitioners belatedly permitted the appointment of a hearing officer and at the regional hearing Petitioners continued to assert that the contract permitted them to avoid writing an IEP, that they had no responsibility to provide trained and licensed teachers, and that none of the educational standards required under Federal and State education law applied once they decided to send Paige to a day care center. The family objected to the services at the center, asserting their right to a "free and appropriate public education" and also asserting that Paige should be in a school. The Regional Hearing Officer found that Paige's due process rights had been violated by the Petitioners due to their failure to permit a timely hearing, (App. 25), that Paige had a right to an IEP, (App. 26), that placement was improperly made prior to the writing of the IEP, (App. 26), that Paige had a right to licensed and certified teachers though finding that as long as educational standards were met in all regards, the location of Paige's educational program could be the training center. (App. 28-31). The "contract" defense of the Petitioners was rejected by the Hearing Officer. (App. 27-28).

The Petitioners, (and not the family), appealed this to the second stage administrative hearing under the EHA. The parents were forced to defend in that second forum

and did so successfully as the State Hearing Officer sustained the decision of the Regional Hearing Officer on all grounds. (App. 33-41).

After passage of the Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, 20 U.S.C. § 1415(e) *et seq.* ("HCPA"), the Georgia State Department of Education ruled that it would not permit parties to raise or seek attorneys fees in its administrative mechanism. (App. 4).[1] The family made a reasonable demand for compensation, and when this was denied they filed suit seeking attorneys fees under the HCPA in the United States District Court. In the litigation before the District Court, the decisions of the Hearing Officers were entered into evidence as well as the affidavit of Ms. Patricia Smith, counsel administratively for the Mitten family, the affidavit of Alan Mitten, and the family's discovery inquiries against the Petitioners. The Petitioners introduced only the family's responses to their discovery.

The trial court did not conduct an evidentiary hearing. There was never any introduction of evidence concerning the intent or objectives of the Mitten family in pursuing their hearing rights, except as reflected in their affidavit. There was no evidence whatsoever taken concerning Mr. Mitten's financial ability to support attorneys fees. The evidence as to his contract with his counsel reflected that he had been billed for fees and had paid his

---

[1] This ruling occurred in *Lauren T. v. Crisp County*, SBE 1986-28, a copy of which was Exhibit D to the Respondents' complaint. A ruling of the State Hearing Officer is binding on all regional hearing officers in Georgia.

costs. The unrebutted evidence established that his objective in securing a hearing was to receive appropriate educational services for his child, and then later, correct the due process violation of the District. These were the two issues identified by the Regional Hearing Officer. (App. 21). The unrebutted affidavits of Mr. Mitten and Ms. Smith established that they had raised and prevailed on a number of claims. The family denied the Petitioners' Request for Admission that the "central issue" in bringing the litigation was only to move the student to another location for services. The Petitioners admitted that the family had prevailed on certain issues.

On March 11, 1988 the District Court denied the family relief. The Court without citing evidence in support of its position determined that the Respondents' "primary objective" was to have the child removed from the Department of Human Resources Center (App. 15), and then declined, in its "discretion", to award attorneys fees by ruling that the Petitioners had acted in accordance with a "recently enacted" contract and that the Respondents could afford to pay fees and did not pay any fees or costs. (App. 15-6). The Court then ruled that the family did not have a right to file their complaint for attorneys fees, relying upon *North Carolina Department of Transportation v. Crest*, 479 U.S. 6 (1986). (App. 16).

The Mitten family appealed this to the United States Court of Appeals for the Eleventh Circuit. During the course of the Court of Appeal's proceedings, this Court decided *Texas Teachers Association v. Garland Ind. Sch. Dist.*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed. 2d 866 (1989) (*"Garland"*) unanimously overruling the "primary objective" standard for attorney's fees used in the Fifth and

Eleventh Circuit under 42 U.S.C. § 1988. While the Court of Appeals below did not cite *Garland*, the Court relied upon the legislative history of the HCPA which sets out the *Hensley v. Eckerhart*, 461 U.S. 424 (1984), "significant relief test" found that the Respondents had prevailed, (*Mitten*, 877 F.2d at 935, App. 7-8), and obtained significant relief as Paige was, through her administrative victory, provided an educational program, provided instruction by licensed teachers and had been denied her "free and appropriate public education" (*Mitten*, 877 F.2d at 936, App. 9-10). The Court of Appeals also rejected the assertion that a good faith but an erroneous position is a defense to attorneys fees. It held that this statute, like all fee statutes, does not require that fees be paid before the reimbursement is sought. (*Mitten*, 877 F.2d at 937, App. 10-11).

The Court of Appeals held consistent with the great body of the case law under the EHA, that the HCPA was intended to permit the recovery of administrative attorneys fees. (*Mitten*, 877 F.2d at 935, App. 6-7). The Court of Appeals addressed the "spending power" argument concerning the retroactive application of the HCPA, (which had been raised in a single page in the Petitioners' Brief), and rejected it holding that the HCPA was passed pursuant to § 5 of the Fourteenth Amendment, granting Congress power not analyzed in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) (*"Pennhurst I"*). (*Mitten*, 877 F.2d at 937-938, App. 11-13). It also found that the retroactivity of the HCPA was constitutional in this particular case, distinguishing its own decision in *Georgia Association for Retarded Citizens v. McDaniel*, 855 F.2d 805, 808 (11th Cir. 1988). *Ibid.* There it had held the

same section unconstitutional in the context of a case where a *prior* decision denying fees had been entered prior to the enactment of the HCPA. After denial of a motion for rehearing filed by the Petitioners below, they now petition this Court for the writ of certiorari.

SUMMARY OF ARGUMENT

The Petition should be denied because the Court of Appeals properly construed and applied the Handicapped Children's Protection Act of 1986, Pub. L. 99-372, 20 U.S.C. § 1415(e) to the factual circumstance in this case. Contrary to the position of the Petitioners there is no present conflict in the circuits as five circuits have ruled that attorney fees may be sought and recovered by families who prevail in administrative hearings under the Education For All Handicapped Children's Act of 1975, as amended, 20 U.S.C. §§ 1401 *et seq.* The single circuit to decide to the contrary has vacated its split decision and calendared the issue for en banc review.

The Petition also states that the standard for determining the "prevailing party" in a fee application should be whether the plaintiff prevailed on the "central or primary" relief sought. This Court resolved that question by rejecting that test for the *Hensley v. Eckerhart* formulation of "significant relief" on "any issue" last term in *Texas Teachers Association v. Garland Ind. Sch. Dist.*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed 2d 886 (1989). Further, the Petitioners suggest that district courts inquire into a family's resources and ability to pay their attorney as a special circumstance to deny a compensatory fee award.

They ask this Court to review the Eleventh Circuit's rejection of their asserted good faith as a defense to attorney fees. These positions are without support in any decision of this Court or any Court of Appeals and should be rejected as irrelevant to the consideration of fee awards.

The Petitioners then suggest that the explicit retroactive provision of the HCPA, which is generally directed and limited in time to correct an error perceived by Congress in *Smith v. Robinson*, 468 U.S. 992 (1984) is unconstitutional under the spending power clause or the separation of power clause of the United States Constitution. Yet the Court of Appeals was correct in approving this legislation as rationally related to a legitimate governmental purpose and therefore as permissible legislation. Further, the law at issue is enacted, in part, under authority found in § 5 of the Fourteenth Amendment of the United States Constitution, which avoids the spending power argument raised by Petitioners.

The effect of the Court of Appeals decision is that the attorney fee act passed as an amendment to the special education laws is being uniformly enforced among the circuits. This enforcement is consistent with the terms of the act and the explicit intention of Congress to assure that families are made whole if they prevail in mandatory adjudicatory hearings to vindicate their disabled child's rights.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED, AS CONTRARY TO THE ASSERTION OF THE PETITIONERS, THERE IS NO SPLIT IN THE CIRCUITS ON THIS ISSUE. THIS RULING IS CONSISTENT WITH THE INTENT OF THE STATUTE, THE LEGISLATIVE HISTORY AND THE LANGUAGE OF THE STATUTE.

The Petitioners ask this Court to grant certiorari contending there is a split in the circuits, and alternatively, that the Court of Appeals improperly construed the statute to permit a party to receive an award of attorneys fees for administrative work. Neither of these two assertions are correct; nor do they support the granting of the petition.

A. There Is No Split In The Circuits.

The Eleventh Circuit Court of Appeals is joined by four (4) circuits in construing the HCPA to permit the initiation of an action to recover attorneys fees for time spent in administrative proceedings. These are *Duane M. v. Orleans Parish School Board*, 861 F.2d 115 (5th Cir. 1988); *Eggers v. Bullit County School Board*, 854 F.2d 892 (6th Cir. 1988); *Counsel v. Dow*, 849 F.2d 731 (2nd Cir. 1988), *cert. denied*, 489 U.S. ___, 109 S.Ct. 391, 102 L.Ed. 2d 380 (1988); *McSomebodies v. Burlington Elementary School District*, 886 F.2d 1559 (9th Cir. 1989).[2] *See also, Arons v. New Jersey*

---

[2] In addition to *Moore v. District of Columbia* the Petitioners cite *Serafina v. San Mateo City School District et al.*;

(Continued on following page)

State Board of Education, 842 F.2d 58, 62 (3rd Cir. 1988) (dicta).

The Petitioners state that there is a split in the circuits based upon the District of Columbia panels' decision in *Moore v. District of Columbia*, 886 F.2d 1335 (D.C. Cir. 1989). That panel in a two-to-one opinion reversed the trial court's decision granting administrative attorneys fees, reported as *Moore v. District of Columbia*, 661 F.Supp. 263 (D.D.C. 1987). That Court's opinion has been vacated by the District of Columbia Circuit Court's grant of en banc review. *Moore v. District of Columbia*, No. 88-7003 (D.C. Cir., November 22, 1989). *See*, Handbook of Practice and Internal Operating Procedures and Rules, D.C. Circuit, August 1, 1987 at XII, (B)(2). Thus there is no split in the circuits which would qualify this case for review under Rule 17 (1)(a) of the Rules of the Supreme Court.

(Continued from previous page)

C-88-0799(JPO) (N.D. Cal. 1989) and *McCormack v. Burlington Elementary School District*, C-88-0141(JPO) (N.D. Cal. 1988). These cases have been reversed by the Ninth Circuit in *McSomebodies v. Burlington Elementary School District*, 886 F.2d 335 (9th Cir. 1989). The only other HCPA case cited by Petitioners is *Rollison v. Biggs*, 660 F.Supp. 875 (D.Del. 1987), which is contrary to the dicta in *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3rd Cir. 1988) and which misapplies a single reference in the HCPA's legislative history. *See, Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp. 921 (N.D. Cal. 1987.)

B. The Eleventh Circuit Court of Appeals Properly Ruled That The HCPA Grants A Claim For Administrative Fees.

The Court of Appeals held that the use of the word "proceeding" in the HCPA was an explicit reference to the administrative proceedings mandatory under the EHA, and that therefore there was a claim in the district court for costs and fees. (*Mitten*, 877 F.2d at 935, App. 6-7). This is consistent with the use of the phrase "proceeding" throughout 20 U.S.C. § 1415, including other references within subsection (e). *See, Unified Sch. Dist. No. 259 v. Newton*, 673 F.Supp. 418, 420 (D.Kan. 1987); *Prescott v. Palos Verdes Peninsula Unified School Dist.*, 659 F.Supp. 921, 923 (N.D. Cal. 1987); *Williams v. Boston School Committee*, 709 F.Supp. 27 (D.Mass. 1989).

The Petitioners suggest that the Court of Appeal's failure to distinguish *North Carolina Dept. of Transportation v. Crest Street Community Council*, 479 U.S. 6 (1986) (*"Crest Street"*) also requires granting of the writ. They must rely on the *Crest Street's* disapproval of dicta from *New York Gas Light Club v. Carey*, 447 U.S. 54 (1980) (*"Carey"*) regarding 42 U.S.C. § 2000e-5(k) attorney fees, when applied to 42 U.S.C. § 1988 situations. This misperceives the HCPA's reliance on *Carey*, and the intentional structural similarities between the EHA and Title VII of the 1964 Civil Right's Act, 42 U.S.C. § 2000e, through their mandatory administrative mechanisms.

In *Crest Street* the litigants had participated in elective administrative proceedings under environmental protection statutes. They then attempted to intervene in a federal proceeding over those issues, under which there

was no right to fees and raise Title VI claims under the 1964 Civil Rights Act, 42 U.S.C. § 2000d. The administrative case was resolved prior to a ruling on the motion to intervene and the district court dismissed the motion. The would-be intervenors then filed an independent action for fees, alleging that they had prevailed administratively on claims that were precursors to their Title VI complaint. This Court held that Title VI did not require administrative proceedings, that the proceeding in which they may have prevailed was not one of the civil rights "proceedings" enumerated under § 1988, and that therefore an independent action for fees was not available. The *Crest Street* opinion relied on legislative history of that fee statute, 42 U.S.C. § 1988, which appeared to limit its application only to court actions. *See, Eggers*, 854 F.2d at 895-6, *citing Crest Street*.

This case is substantially different due to the intended difference in the EHA/HCPA. Here the fees arise directly from the same proceeding between the parties, after the Mittens' final success in the administrative mechanism. This, unlike *Crest Street*, is not a collateral attempt to gain a fee award. *Duane M.*, 861 F.2d at 118. The EHA is also much more like Title VII than Title VI. Here mandatory hearings adjudicate and resolve disputes between litigants. These force families into retaining counsel, preparing and presenting witnesses and evidence, and rigid procedural restrictions, including administrative appeals. In this process parents may be partially successful but appeal the case based upon issues they lost to the district court. If they then fully prevail they would have a right to compensation for time spent in the administrative proceeding as long as the time met

the test of *Webb v. Dyer County Board of Education*, 471 U.S. 234, 243 (1985) as necessarily related and useful to their ultimate success. Other parents, like the Mittens, may be entirely successful in the administrative trial and not need to seek district court review. Thus, under the HCPA, like Title VII:

> It would be anomalous to award fees to the complaintant who was unsuccessful or only partially successful in obtaining state and local remedies but to deny an award to the complaintant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

Carey, 447 U.S. at 62-63. The legislative history of the HCPA shows that the "sponsors and legislative committee members agreed to provide complete reimbursement for the entire expenses incurred in both the mandatory administrative proceeding and the later court action." Schreck, "Attorney's Fees For Administrative Proceedings Under The Education Of The Handicapped Act: Of *Carey, Crest Street* And Congressional Intent", 60 Temple Law Quarterly 599, 650 (1987). The intent of Congress is articulated explicitly at each step of its consideration. *E.g.*, S. Rep. 99-112, 99th Cong., 1st Sess., (1985) at 7-8; H. Rep. 99-296, 99th Cong., 1st Sess., (1985) at 5; and H. Cong. Rep. 99-687, *reprinted in part*, U.S. Cong. & Admin. News, 99th Cong., 2nd Sess., 1799, 1807-1810 (1986). "In short, in floor debates over two years and in various legislative reports, both houses of Congress unambiguously assented to attorneys' fees for work done solely at the administrative level." *Unified School Dist. No. 259 v. Newton*, 673 F.Supp. 418, 422 (D.Kan. 1987). *See discussion, Eggers*, 854 F.2d at 895-898; *Duane M.*, 861 F.2d

at 118-119; *Chang v. Board of Educ. of Glen Ridge TP.*, 685 F.Supp. 96, 98-100 (D. N.J. 1988); *Mathern v. Campbell County Children's Center*, 674 F.Supp. 816, 818 (D. Wyo. 1987). In summary *Crest Street* is not authority to deny the Mittens' claim for costs and fees expended. They had to initiate a "proceeding" to adjudicate their rights and the district court therefore is authorized under the HCPA to see to their reasonable compensation.

II. THE PETITIONERS ASSERTION THAT THE ELEVENTH CIRCUIT COURT OF APPEALS USED THE WRONG LEGAL STANDARD TO DETERMINE WHETHER THE FAMILY HAD PREVAILED, I.E., HOLDING RESPONDENTS HAD OBTAINED SUBSTANTIAL RELIEF INSTEAD OF UTILIZING A "CENTRAL ISSUE" TEST IS WITHOUT MERIT. THE COURT OF APPEALS PROPERLY APPLIED THE *HENSLEY v. ECKERHART* STANDARD.

The Petitioners ask this Court to grant review as they believe the Court of Appeals applied the wrong standard for entitlement to fees. They assert that the Court of Appeals should have used a "primary/central issues" test to determine whether the Respondents had broken the threshold to become prevailing parties for the purposes of an entitlement to attorneys fees. This is without merit based upon this Court's holding in *Texas State Teacher Association v. Garland Independent School District*, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed 2d 866 (1989). Further, to the extent it relies upon an erroneous construction of the relief granted in the administrative hearing, the Court of Appeals was correct in reversing.

A. The Standard Of Review Is The *Hensley v. Eckerhart* Standard of Substantial Relief.

The trial court without citation found that the Respondents were not prevailing parties as they had not been successful in their "primary objective". *See*, Trial Court Order at 2, App. 15. As noted above the Petitioners did not put forth any evidence to support their version of the family's "primary objective". The family attacked this on appeal as utilizing an improper standard and as clearly erroneous.

Respondents concede that prior to last term the Fifth and Eleventh Circuits had used a confusing "primary relief" test under 42 U.S.C. § 1988. *See, e.g., Wilson v. Attaway*, 757 F.2d 1227, 1248 (11th Cir. 1985), *Miami Herald Publishing Company v. City of Hallandale*, 742 F.2d 590 (11th Cir. 1984). Yet even in the Eleventh Circuit some courts had backed away and avoided articulating the standard as a "central issue" or "primary relief" test, going instead straight to *Hensley*'s "substantial relief" formulation. *E.g., Odum v. Clark*, 748 F.2d 1538 (11th Cir. 1984); *Popham v. City of Kennessaw*, 820 F.2d 1570 (11th Cir. 1987), *citing, e.g., Hensley* and *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).

In response to this status of the law, the family below asked the Eleventh Circuit to recognize that the HCPA used the significant relief test as a matter of statutory construction, or alternatively, invited that court to overturn the "primary/central issue" paradigm. The family argued below that Congress had clearly intended that the *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("*Hensley*") standard of "substantial relief" be utilized under the

HCPA. They cited the extensive legislative history of the act, expressly setting out and incorporating the *Hensley* standards. *E.g.*, H.Rep. 99-296, 99th Cong., 1st Sess. (1985) at 5-6. The court below chose to apply the *Hensley* test of substantial relief to the HCPA. (*Mitten*, 877 F.2d at 936, App. 8-9).

This Court in *Garland* addressed the "primary relief/central issue" standard and held that the "'central issue' test was directly contrary to the thrust of (the) decision in *Hensley*". *Id.*, 103 L.Ed 2d at 876. The proper threshold for fees is whether the plaintiff succeeds on "any significant claim affording (them) some of the relief sought". *Ibid.* This Court went on to state that the central issue test creates a subjective problem that is almost impossible for the judiciary to answer, that is, what was the primary relief in the minds of the plaintiffs when they filed their litigation. *Ibid.* The Petitioners ignored *Garland* below and in their petition. The suggestion that this Court should grant review to correct the Eleventh Circuit's failure to utilize the "primary relief/central issue" test is meritless.

B. The Plaintiffs Prevailed On A Significant Issue In The Litigation And Obtained Some Of The Relief They Sought.

As the Respondents demonstrate in the statement of the case, the administrative hearing in this case was sought because Paige Mitten was not in school, had no IEP and the school district was taking the position that they had no duty to provide services for her at all. Later, the Petitioners refused to initiate due process procedures. During the course of the administrative proceedings and

later by virtue of the administrative order, Paige Mitten earned a right to special education services, gained a hearing and a declaratory decision that the District had acted improperly in denying a hearing request, and also gained a right to have all of her services protected under EHA standards. She won the right to certified teachers and EHA standards for her services. She did not directly prevail on one issue, which was where the services should be located. Faced with the Regional Hearing Officer's decision, the Petitioners, not Paige Mitten, appealed to the State Hearing Officer. The State Hearing Officer rejected their appeal and affirmed the Regional Hearing Officer.

In the District Court, the family introduced uncontroverted affidavits addressing their "primary issue". These stated that the objective of the litigation was to secure Paige her "FAPE", 20 U.S.C. § 1401(18), through an IEP and a proper school program. This was the same issue identified by the hearing officer. (App. 21). The family denied the Petitioners' discovery request that they had lost the primary issue claim; the Petitioners admitted in discovery that the family had prevailed on certain issues. The Petitioners introduced no other evidence but nevertheless argued in the trial court, on appeal and now before this Court, that they somehow knew what the "primary issue" had been and that they had won the litigation.

On this evidentiary record the trial judge inexplicably concluded that the family's "primary issue" had been to remove their child from a training center. The Eleventh Circuit Court of Appeals properly reversed this holding. (*Mitten*, 877 F.2d at 936, App. 8-9). First it is clear that the

child obtained significant relief in that she obtained special education and related services that are appropriate to her under the EHA. In this regard one need only rely on the clear holdings of both administrative hearing officers. These in part provide:

> In review of the above findings and the evidence considered my decision is that:
>
> (1) The Muscogee County School District violated the time lines by not scheduling a due process hearing within twenty days from the receipt of the official notice from the parents' attorney; and,
>
> (2) That the Muscogee County School District failed to provide the child a free and appropriate education in that it failed to develop and implement an IEP for the child prior to October 23, 1985.

Decision of the Regional Hearing Officer, App. 31-2. The State Hearing Officer's decision states:

> The Regional Hearing Officer decided that the Local System violated the time lines by not scheduling a due process hearing within twenty days after receipt of the official notice from the parents' attorney. The Regional Hearing Officer also decided that Local System failed to provide a free, appropriate public education because:
>
> (1) it failed to develop an IEP for the student prior to October 23, 1985; and,
>
> (2) the placement is not consistent with the regulations which require the student to be provided in education which meets the standards of the state educational agency . . .

Decision of State Hearing Officer, App. 34. The State Hearing Officer at Part IV of his decision then concluded:

> Based upon the foregoing discussion, the record presented and the briefs and arguments of counsel, the state hearing officer is of the opinion that the local board failed to demonstrate and offer the student an appropriate program and that the local board was responsible for violating the time lines when it failed to request a hearing upon the request of the parents' counsel.
>
> The decision of the regional hearing officer, to the extent it is consistent with this decision is hereby
>
> Sustained.

Decision of State Hearing Officer, App. 41. Thus the conclusion of the Court of Appeals is correct. The improper conduct of the Petitioners terminated to the benefit of the child, *see, Hewitt v. Helms*, 482 U.S. 757, 761 (1987); *Rhodes v. Stewart*, 488 U.S. ___, 109 S.Ct. ___, 102 L.Ed 2d 1 (1989), and Respondents have therefore "prevailed". The Petitioners continued colorization of their actions is dilatory if not frivolous.

III. THERE ARE NO SPECIAL CIRCUMSTANCES WHICH EXIST TO DENY THIS FAMILY A RIGHT TO ATTORNEYS FEES.

The Petitioners at Question III assert that their actions in denying services to this severely mentally retarded student were somehow justified by an agreement between several branches of state government. Alternatively, in this section they assert that the family had the ability to pay for legal services and therefore they now have no right to reimbursement for the cost of securing their child's statutory (and constitutional)

rights. Under the holdings of this Court and virtually every lower court which has addressed the issues, Respondents are entitled to an award of attorneys fees unless there are special circumstances making such an award unjust. *See, Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 417 (1978); *Concerned Democrats of Florida v. Reno*, 601 F.2d 891 (11th Cir. 1979); *Morrow v. Stewart*, 580 F.2d 1284, 1300 (5th Cir. 1978). If special circumstances exist the burden of establishing that rests on the party opposing fees. *E.g., Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 611 (7th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). Further, the circuits have uniformly held under related attorneys fees bills that good faith is not a defense to the entitlement of the plaintiff as a prevailing party and not a special circumstance sufficient to deny recovery. *E.g., Espino v. Besteiro*, 708 F.2d 1002, 1005-6 (5th Cir. 1983); *Burke v. Guiney*, 700 F.2d 767, 772 (1st Cir. 1983); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985). *See also, Fontenot v. Louisiana Bd. of Elem. and Second. Educ.*, 835 F.2d 117, 120 (5th Cir. 1988) (HCPA case).

In addition, the factual assertion of the Petitioners that their illegal conduct was simply the enforcement of a contract between two branches of State government was rejected by the Regional Hearing Officer and by the State Hearing Officer. (App. 27-8 and App. 37-8). Both found that the so called "pact" between the several state agencies did not permit or condone the denial of rights which should be afforded Paige Mitten. The final construction of the "pact" was that it could not waive or terminate the student's rights. It was therefore enforced against the

position of the Petitioners and this "special circumstance" never factually arose.

On the next issue, the Petitioners in the trial court, in the circuit court, and again before this Court continue to state that Paige Mitten had the "ability to pay" for the legal services and/or that these had never been billed to her family. First, there was no evidence whatsoever to support this assertion. The only evidence submitted explicitly stated that the family had been billed for the legal services and that the family had paid the costs. The unrebutted evidence reflected that the family remained liable for the attorneys fees. The ruling of the trial court cited no evidence supporting the conclusion that the family had the ability to pay.

The threshold entitlement is whether the family "prevailed". A family's ability to pay attorneys for helping them secure statutorily protected rights is irrelevant to any consideration of entitlement to fees. (*Mitten*, 877 F.2d at 937, App. 10.) The economic status of the family is not and should not be before any court. It would create differential justice: One standard of law for those with the funds to vindicate their rights and a second standard of law for those with less funds. One also can only ponder how a court would determine whether the family could pay. Do families with large expenses in caring for handicapped students have to earn more than others? Certainly no family, no matter how wealthy, anticipates that they will have to initiate litigation to have their child afforded a public education. How much should a family make to deny them an award? When the Petitioners appealed and subjected this family to additional costs and fees, when would the Mittens become financially

unable to further support the litigation? If the case went on could a family become financially unable to pay when their resources were exhausted, and if so, would their entitlement begin from that point in time or relate back? If, as this Court held in *Garland*, a trial court should not inquire into the "primary" objective of the family, it is even more egregious to suggest that trial courts should make case by case determinations about a family's ability to pay their lawyer in order to entitle that family to reimbursement for the cost of vindicating rights.

The Respondents believe this Court has implicitly rejected the question of payment in *Blum v. Stenson*, 465 U.S. 886 (1984) where the ability to charge clients was determined irrelevant to whether the plaintiffs had prevailed and can collect fees. Similarly in *Hutto v. Finney*, 437 U.S. 678 (1978) this Court permitted an award and collection of compensatory attorneys fees where attorneys fees had been initially paid by a third party. The Court of Appeals below and its predecessor, the Fifth Circuit Court of Appeals and the other circuits which have addressed this issue have uniformly rejected as being outside the rubric of "special circumstances" any consideration of a plaintiff's financial ability to pay. *See, e.g., International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980); *Gore v. Turner*, 563 F.2d 159, 163-4 (5th Cir. 1977); *Leonard v. Argento*, 699 F.2d 874, 900 (7th Cir. 1982), *cert. denied*, 464 U.S. 815 (1983). *Cf. Eggers*, 854 F.2d at 898-900 (Fees may be awarded to public agency). There is no reason for reviewing or upsetting the decision below on these grounds.

IV. THE IMPLEMENTATION DATE OF THE HCPA GRANTING A RIGHT TO ATTORNEY'S FEES FOR THE LIMITED NUMBER OF CASES RESOLVED BETWEEN *SMITH V. ROBINSON* AND THE ENACTMENT OF THE HCPA IN AUGUST OF 1986 DOES NOT VIOLATE THE SPENDING POWER CLAUSE OR THE SEPARATION OF POWERS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The trial court in this case never reached the issue whether or not the HCPA by its retroactive application violates the spending power clause or the separation of powers clause of the United States Constitution. The Petitioners raised this claim in a single page of their responsive brief before the Eleventh Circuit. The Court of Appeals reached the issue and upheld the constitutionality of the law. A similar conclusion has been reached by the other Courts of Appeals which have addressed the issue. *E.g., Counsel v. Dow*, 849 F.2d at 737-739. Moreover, the Eleventh Circuit has been particularly sensitive to these issues, denying retroactive attorneys fees in an earlier case where it viewed a prior judgment on fees rendered after *Smith v. Robinson*, 468 U.S. 992 (1984) as requiring dismissal of a new petition under the HCPA. *See, Georgia Association for Retarded Citizens v. McDaniel*, 855 F.2d 805, 808 (11th Cir. 1988), *cert. denied*, 489 U.S. ___, 109 S.Ct. 2431 (1989).

The HCPA at § 5 expressly makes it retroactive to cases pending before *Smith v. Robinson* or decided after *Smith v. Robinson* but prior to the enactment date. The analysis of retroactivity raises a due process question and the "burden is on the one complaining of the due process

violation to establish that the legislature has acted in an arbitrary and irrational way". *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1, 3 (1976) (hereinafter "*Elkhorn*"). *See, Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717 (1984) (hereinafter "*Gray*"). *See also, Counsel v. Dow*, 849 F.2d at 739-738, *Tonya K. By Diane K. v. Bd. of Educ. of Chicago*, 847 F.2d 1243 (7th Cir. 1988). (HCPA cases). *See Discussion*, Hockman, "The Supreme Court and the Constitutionality of Retroactive Legislation", 73 Harv. L.Rev. 692, 719 (1960). This analysis has never been addressed or distinguished by the Petitioners. Applying the test, it is clear that the HCPA was legislation which was intentionally retroactive, was curative and is rationally related to a legitimate government purpose, and therefore withstands constitutional challenge.

In *Gray* a bill was passed to amend Title IV of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1301 *et seq.*, ("ERISA") because one of ERISA's problems was that it encouraged withdrawals from multiemployee plans. Pub.L. 96-364, 94 Stat. 1208. Congress made that amendment retroactive because it was "properly concerned that the employees would have an even greater incentive to withdraw if they knew that legislation to impose more burdensome liability in withdrawing was being considered". *Gray*, 467 U.S. at 730. The *Gray* court relied on the earlier decision in *Elkhorn*. There twenty coal mine operators had challenged part of the Black Lungs Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.*, on the grounds that it offended due process because its retroactive provisions required operators to compensate workers who no longer worked in the industry. This Court deferred that decision to Congress and held that

the due process clause poses no bar to such compensation. *Id.* 428 U.S. at 19-20. The *Gray* opinion was also cited with approval in *United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam), a decision upholding a retroactively imposed income tax. There this Court stated:

> This retroactive application has apparently been confined to short and limited periods required by the practicalities of producing national legislation. We may safely say that it is a customary congressional practice.

Darusmont, 449 U.S. at 296-297. Since *Gray* this Court also upheld retroactive application of the Federal Land Policy and Management Act, 43 U.S.C. § 1701, Pub. L. 94-579, 90 Stat. 2743, even though some individuals lost mining rights they thought they had owned in *United States v. Locke*, 471 U.S. 84 (1983). *See also, Temple University v. United States*, 769 F.2d 126 (3rd Cir. 1985); *Brown v. McGarr*, 774 F.2d 777, 782-4 (7th Cir. 1985); and *Jones v. Reagan*, 748 F.2d 1331, 1339 (9th Cir. 1984).

Even the cases Petitioners cite on retroactivity do not support their position. *United States v. Sioux Nation of Indians*, 44 U.S. at 371 (1980) does not prohibit all retroactive legislation but involved a case where the Government renewed claims (extended retroactive liability against itself) and this Court determined that that was permissible legislation. One of the tests which emerged from the Sioux Indian cases is that there is no due process or separation of powers concern if the legislation is general, that is, if it is not directed to individuals as an attempt to create or reverse a particular result. Thus courts have relied upon the general application of the

HCPA to support its constitutionality. *E.g., Capello v. District of Columbia Board of Education,* 669 F.Supp. 14 (D.D.C. 1987). In summary, as the general retroactive provision relates to a limited number of cases in a two-year window and it is rationally related to legitimate governmental purposes as curative legislation designed at protecting families under the EHA, it is permissible legislation. The retroactivity challenge does not support the granting of the writ.

The Petitioners also suggest that liability in this case would impair their contractual obligations in violation of *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981) (*"Pennhurst I"*). Again, this is an issue which was not addressed by the trial court but rejected by the Court of Appeals when raised by Petitioners. Petitioners have never distinguished any of the HCPA cases which hold directly against them on these issues. *E.g., Counsel,* 849 F.2d at 735-6; *Sch. Bd. of Prince William County v. Malone,* 662 F.Supp. 999, 1000 (E.D. Va. 1987); *Unified School District No. 259 v. Newton,* 673 F.Supp. 418 (D. Kan. 1987).

Petitioners' argument does not acknowledge that the EHA and the HCPA were passed in part due to Congress' power under the Fourteenth Amendment creating substantive rights. *See, Honig v. Doe,* 488 U.S. ___, 108 S.Ct. 592, 98 L.Ed. 2d 686 (1988). Therefore fee obligations are a proper exercise of authority irrespective of the spending power analysis in *Pennhurst I.* Petitioners also ignore the fact that the fee obligation is clear and unambiguous, and therefore the spending power authority is not infringed under *Pennhurst I.*

Pennhurst I held that the Developmentally Disabled Bill of Rights Act, 42 U.S.C. § 6010 created no substantive rights and that Congress acting only pursuant to the spending clause could not impose financial burdens on the states in exchange for federal funds unless it did so unambiguously. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), *Smith v. Robinson*, 468 U.S. 992 (1984) and *Honig v. Doe*, 488 U.S. ___, 108 S. Ct. 592, 98 L.Ed. 2d 686 (1988) this Court has held that the EHA protects substantive and specific rights. *See also, Manacke v. School Board of Pinnelas County, Fl.*, 762 F.2d 912, 918 n.6 (11th Cir. 1985), and *Fontenot v. La. Bd. of Elem. and Second Ed.*, 835 F.2d 117 (5th Cir. 1988). Thus once it is clear that the exercise of Congress' power was to protect rights or that the legislation was enacted under the Fourteenth Amendment, the *Pennhurst I* argument falls. *See generally, Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-7 (1976); *Jones v. City of Lubbock*, 727 F.2d 364, 374 (5th Cir. 1984). Under § 5, Congress has authority to impose attorneys fees obligations, *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1973), and these duties may be imposed retroactively, *Hutto v. Finney*, 437 U.S. 678 (1977). *Accord, Counsel v. Dow; United School District No. 259 v. Newton*, 673 F.Supp. 418, 423-4 (D.Kan. 1987); *Barbara R. v. Tirozzi*, 665 F.Supp. 141 (D.Conn. 1987); *Turton v. Crisp County Sch. Dist.*, 688 F.Supp. 1535, 1538-9 (M.D. Ga. 1988); *Yaris v. Special Sch. Dist.*, 661 F.Supp. 996, 1001 (E.D. Mo. 1987) (HCPA cases). Thus these grounds are not a basis for granting the writ sought by the Petitioners.

The Petitioners' argument also overstates *Pennhurst I*. There this Court held that the spending power clause could extend obligations but it must do so clearly and

unambiguously. *Pennhurst I*, 451 U.S. at 147. The HCPA expressly makes itself retroactive and therefore does not cross the *Pennhurst I* limitation. *See, e.g., Mitten*, 877 F.2d at 937, App. 12; *Counsel v. Dow.*

CONCLUSION

The Petitioners have not demonstrated any grounds for the granting of the writ. There is no division of authority between the circuits and the great weight of the case law is with the Court of Appeals. The statutory construction of the HCPA below has ample support in the plain wording of the act, as reinforced by the legislative history of this curative legislation. The question of the test for "prevailing parties" was resolved adverse to Petitioners last term in a case the petition ignores. A plaintiff's "ability to pay" an attorney should not be a special circumstance denying entitlement to fees. Finally, the HCPA is constitutional legislation and the Petitioners have not demonstrated any credible argument to the

contrary. The Respondents ask this Court to deny the Petition for the Writ of Certiorari.

Respectfully submitted,

JONATHAN A. ZIMRING
Georgia State Bar No. 785250
Counsel of Record

EDWARD L. GREENBLATT
Georgia State Bar No. 307800

LIPSHUTZ, GREENBLATT & KING
2300 Harris Tower
233 Peachtree Street
Atlanta, Georgia 30043
(404) 688-2300